Reeve Tapping

Assumpsit by Judge Reeves

Assumpsit is a promise a deed not to do some act and it is immaterial whether it is by parol or by writing
If the promise is by a sealed instrument the action of covenant assumpsit will not lie but some other such or covenant &c.
Assumpsit is founded on some contract either express or implied
An implied assumpsit is when the contract has not been settled by the parties as to a fixed mode of act.
It seems express and special assumpsit or agreements
In many cases special and indebitatus assumpsits concurrent actions. They are concurrent in the two following cases
1 When the promise is to pay money but it is not for money paid. The reason of this rule is the law raises or implies an indebtedness which supports indebitatus assumpsit.

Indebitatus lie on a note for money — on the money lent & on the note in evidence of the indebtedness —

Assumpsit and indebitatus Assumpsit lie also in consideration where the subject is not the same e.g. A promises B to do a thing and is paid the money for doing of it and never afterwards performs neglects to perform his contract — now B the promisee may bring an action of indebitatus for money paid to him use, or on assumpsit — the reason why B may bring an action of indebitatus assumpsit is that A has considered the contract as a nullity by non performance and B may do the same and then the breach no contract A has money which belongs to B which he cannot conscientiously hold — for which indebitatus lies And it matters not whether the contract was in writing or by parol — and the promise B treats it (and has a right so to do) as a nullity — The general rule laid down in the books seem

contradictory to the above position — but if properly considered it will be found not to clash with it — for the rule means nothing more than this viz — When a contract is in writing you must allow it to be in writing or other if you sue upon a contract you must prove it by the writing if it has been reduced to writing for the rule is the best evidence the nature of the case admits of must be had —
In some cases express assumpsit only lies — as e.g. When the promise is to do some collateral act for which the money is to be paid at some future time — the breach of this sounds only in damages which must be ascertained by the bond jury
A agrees to build a house for B for 1000$ and have it completed by the expiration of 6 months — now if A does not build the house an action lies in assumpsit only on the undertaking or promise
Suppose the parties assess damages themselves — then the whole penalty may be

received - and for the penalty on action of indebitatus assumpsit lies
It is said in some books that Indebitatus assumpsit lies only when debt will lie - but this is not correct - yet Indebitatus lies in many cases where debt does and in many cases where debt cannot lie. -
If a contract for goods is partly made but not completed or if I take the goods without promising to pay for them - in this case an action of indebitatus assumpsit lies on a quantum valebat - But will not debt lie also Yes - but is the sum certain - yes for the maxim id certum est quod certum reddi potest applies - Special Assumpsit will not lie. -
So if A agree to work for John Stiles 6 months without stipulating any price - I may bring an action of indebitatus on a quantum meruit - Debt also may be brought
So also indebitatus lies for any professional services as will debt e.g. for doctors fees &c.

In many cases Indebitatus is not concurrent with any other action - it is not concurrent with Debt for the action of Debt is always founded on privity of contract.

Suppose a man has got my money by fraud the law raises a promise that he will pay it back and indebitatus assumpsit lies - so in many cases where you are entitled to Debt -

When money is got by extortion fraud & the law will not help the person even to get back but the reason is that the law supposes them both joint debtors and will lend its aid to neither of them -

If A & B embezzle with A and gets his money from this is fraudulent yet the law will not help him to recover it back for he was in pari delicto and had no right to play and let him have it, and learn wisdom by experience - Since it is so the law he could not recover it back - some of the State have enacted laws which give the power a right to recover of the giver but this is not to help the party who has lost so much as to destroy the practice of

Gambling - But supposing A lodges of B but B had not funds him - could B compel A to pay him - no the law will not help either they are joint debtors and let them help themselves if they can -

Suppose A runs his neighbour drunk and makes him give him a note for 100£ which he pays when he is sober can he recover this back no - but if A had first got him drunk and then made him execute a note it would be very different -

But there are some cases where if two men break the laws viz the law will permit the injured to get satisfaction -

In usury - if the borrower gives more than legal interest he may recover back the surplus - But the law does not regard the parties as being in pari delicto for the borrower may be "bad debtor" for cash and compelled to give more than legal interest if he cannot obtain the loan for less -

I'll mention another case where there is no doubt his practice upon -

the borrower and the lender can conscientiously hold what he has got - A a Speculator goes to B to borrow money - B has no money but what is in the bank drawing 6 per cent - A thinks he can make 500 per cent and does make it - he agrees to give B 9 per cent for 10.000 $ - now will Indebitatus assumpsit lie - Judge Reeve seems to think it would not -

It is frequently said in the books that the reason why indebitatus will lie is because the law implies an assent But this is not correct for the law does not ~~depend~~ make the liability to depend upon an agreement or assent - it often makes him liable when he is directly opposed to the performance - suppose a man turns his wife out of doors - now he is bound to pay for her food and necessaries though he has not assented - so when one cheats another - he does not assent to repay the money - But in many cases the law rightly presumes the assent as when too much money is paid by mistake - there is an implied promise to repay -

Assumpsit by Judg Reeves

There is one case where this action though in the form of a contract is concurrent with trespass.
When A takes B's horse unlawfully & you may have an action of trover-or on action indebitatus assumpsit for what the horse was sold for.
If there lie two or more actions upon which judgment is given, (upon the same evidence) one may be plead in bar to another.
A contract has been made by fraud and money thus obtained - indebitatus assumpsit lies or an action of fraud will lie.
When applied to lands, caveat emptor does not apply, for in Eng. the value is certain but here the case is different our lands are daily rising and falling.

Lands ~~relations~~

Laid down that when a contract of a higher nature is entered into, the lower merges and you cannot sue upon the lesser contract.
Thus when the a bond is given for a simple note of hand - the note merges - this is not true in old cases.
Suppose the bond is not given for the

3

for the debt but to secure the performance of some act — A promise to pay or convey land — a bond is given for security of the performance It is not given for the debt it is only in aid of it — it does not take place of the debt. Suppose A. B. C having been quarrelling give each other a bond to abide the award whatever it may be —

Now if after the award — and refusal by any one to pay — an action lies on the bond or on the ~~debt~~ award — for this is only to secure performance —

Again, laid down in elementary writing if a man has got a bond and has a promise after words to pay the debt — never can an action be brought on the promise — no — there is no consideration — the bond is good and why should there be three or four actions for the same thing.

Yet there is some cases where an action will lie in this case — Suppose John Stiles comes to Stokes and tells him he owes him a bond Stokes denies it — but says if he will go and get it — ~~he~~ and show it to him he will pay it — A. Stiles gets it and shows it to him — now an action will lie on this promise — but for what — not for the money due on the bond but for damages which he has sustained for his trouble &c. —

Some contracts void on account of Stat of frauds and perjuries — this Stat has been copied into all the Statute books — this was Stat 29 - Ch 2^d among the cont in the

Promise to pay the debt of another — This is void unless it is in writing —

A owes B and C comes to B and tells him he will pay (and this is by parol) him — this is void because it was a collateral undertaking and the original debtor is still held liable —

The ground upon which so many cases are taken out of the Statute —

So long as the right to recover remains against the Debtor the case comes within the Stat —

A owes B — C tells him if he will not sue A he will pay the debt — this ~~will~~ is without writing is void —

But if C tells B if he will Surrender the note to him B will pay it — now this is originally and is taken out of the Stat —

But if it is collateral then it must be in writing —

Suppose the original debtor is holden yet if the creditor gives up the any ~~note~~

hold then this is original and take it out of the Stat-
If A has an execution vs B - and takes his cattle
and C comes to A and begs him to stay execution and he will pay
him - release the cattle tho the execution is still good - tis original
Some think that if there is a new consideration
this takes ~~this~~ it out of the Stat, but this is not
true - If A promises A I will forbear he
will pay the debt - now here this is ~~not~~ a
new consideration though tis not good
without being in writing -
As to letters of recommendation - this is not an
original promise - it has nothing to do
with the Stat of frauds and perjuries -
Suppose A says to B let C have the goods and
I will pay - A is the debtor and the goods are
charged to him - But if A says let C have
the goods and I will pay you if he wont -
here this should be in writing for tis collate-
ral

Exemplification of the former principles

When a man cant retain money unconscienciously you may recover it back by indebitatus assumpsit - vide 2 Burr 1012

Money paid on an insurance and afterwards the ship arrives - this can be recovered back - and is under judg^t of court 1010

As a general rule you cannot impeach the judgt of Court — a new trial is usually had in these cases —

Now in this case judgt is no impediment to a money in this action of Indebitatus assumpsit unless the judgt is impeached. This does not go upon the ground of impeachment for the judgt was right but something has occurred which makes the ~~money~~ party unconscientiously ~~incapable~~ capable of holding conscienciously.

Suppose a man is supposed to be dead upon good proof — and administration is granted out — and money is paid by the administrator and recd by the administrator — the man appears — the administrator must repay to him all the money he has in his hands.

A sued another for 100£ in bank — and the Deft did not appear — but told the Deft [Plff?] to wit the party that he had no money but would suffer judgt to go against him by default — the Deft did not owe him only 20£ — now judgment against him for 100£ and an action of indebitatus was brought to recover back the money — but it did not lie — tho a new trial was granted and the money and damages recovered back —

2 Burrow 281 — 112

So when the consideration happens to fail the action lies to recover back the money paid.
This is illustrated by an annuity - when only part cash is paid some goods perhaps - now the part not being ~~paid the~~ cash the annuity is void - and so the consideration fails and the money may be recovered back by indebitatus assumpsit for money and goods
1 Stk 732
Suppose in this case E had been a bondsman for the payment of the annuity would indebitatus assumpsit lie - no for he did not receive money to his use - 2 Str 366
A promised to give B a ~~saloon~~ - he did not do it then, the money was paid. and ~~the~~ A was evicted and had no title and hence the consideration failed and the action lay -
Bolm ref 381[4]
Money is paid for doing a thing which becomes illegal - now the consideration fails and the money may be recovered back by indebitatus assumpsit -
So in a sale of an article the consideration may fail - A sells B a barrell of fish and it proves that the fish was rotten - now the consideration fails - indebitatus lies - an action of [illegible] does not lie he [illegible]

there is no fraud in this case -
Suppose A sells B something which proves not to have belonged to the seller at the time of sale - indebitatus lies -.

This lies to recover money paid by a person who acts by a void authority.

A is a creditor of B - C forges a power of attorney to receive this money of A - C employs a lawyer to bring this act for the money - now A pays the money to C - Now must A pay it again! yes he must pay for he paid under a void authority - Why is it so - because it is just debt and A will loose it otherwise - one must loose and the person who pays should loose

Prior est tempore potior est jure

One set of cases where the authority is void when the money cannot be recovered back

Letters of administration is granted to A now A sues B. C. D. - they pay - afterwards a will appears - now the administration is void authority - now must they pay again - No they need not - let him go to the Administrator
But the administrator is a bankrupt - then he must lose it

Now it is from policy that wh a man is compelled to pay money from the authority of judicial acts then th money need not be paid ~~back~~ again as a second payment would destroy confidence in courts of justice

Contra 1 Salk 22"

"this case cannot be reconciled with the other,

A owed B money – B died – C forged a will and was appointed administrator – A paid to the administrator a debt he owed to the testator this would held to be a null payment and had to pay it over again –

3 Ch 125

Had he been using this will he been had the money in this case must be paid again –

3 Ch 127

The court who rendered the judgt had no authority to render judgt – now money paid in consequence of this ~~in~~ can be recovered back again for such payments amount to nothing in the eye of the law –

suppose a justice renders judgt for 20 dolls this is void – for the justice had power only to go to 15 dolls as the case may be 1 Sal 742

5 case must undoubted -
Ld Mansfield said that you may decide against a judgt if the court who gave it had not jurisdiction to try the cause -

Judge Reeve Ld Mansfield was right

McFarland = sold 2, 30 shilling notes to Moses and enters into a covenant with (Moses if he could not get the money he would pay back the money) that he would not come upon or sue him even if the person of whom Mc bought the notes did fail to pay
(Moses sues the note in a court of conscience judgt was rendered - the covenant was for 6£ and then court could not take notice of the covenant - & sue they had no cognisance of more than 40 shillings
the covenant was never to come upon the man that is McFarland for the money for the money if he could not get it of the person of whom he bought the notes that is the promissee

& that the courts could not be introduced & evidence and an action was brought afterwards upon the court - But is this not impeaching the former judgment - no the had no jurisdiction over the covenant

2 Burr 1005 - 2 Bl 219

As to usury ~~—~~ that the supplier can't get back.

If the sum of money is paid upon an illegal contract which the law has inflicted ~~no~~ penalty upon the payer ~~but if the was a penalty~~ he may recover it back but when the punishes a man for doing something he is parti acceditur —

In Eng every lottery office is forbid to ensure tickets — A insures B — B ~~pays~~ to ~~the money~~ does not draw a ~~ticket~~ prize — A pays him and now wishes to get it back — no he is punishable

A man who was the owner of lottery tickets paid the insurance — the same.

2 Bl. 1073 — Wing. Ab. 55

Cowp 790

So this action is used for recovering penalties on bye laws

2 Lev 252 Carth 92

So ~~too~~ to recover tolls —

1 T R 619

When one man does that which another is bound to do, the doer may recover of the person who is so obligated — this action lies — But one must not carry this too far —

A owes B — C pays B presuming that
he can get it of A — he cannot get of
A — for he had no business to pay its debt —

Where there is a duty upon a man
to furnish necessaries and he does
not then if you furnish them
you may recover of the person who
was obligated to furnish them

Suppose A turns his wife out of
doors — he who furnishes her
with necessaries may recover of A —

A turns his ~~wife~~ child out of doors
the case is the same — so if A beats his child
and he is obliged ~~out~~ to run away the case is the same
This is not confined to necessaries —

A buried B's son who died in Jamaica
and then brought his action against his father and
the action of indebitatus lay — for the father was bound to bury the son
But if there is no ability to pay then the case
is different

A a poor man has a wife ~~without~~ and children
in distress — B says that if A will not get
his wife shoes and so forth he will and make
A pay them — here it would be wrong to run a poor man in debt — and
cannot recover of him
But the town is liable in any case — then
if the town does not refuse to pay or be made

as they are for them he who pays forth[?] [illegible] can recover in an action of indebitatus assumpsit

Express Contracts —

1 [illegible] Soles — the vendor may bring his action upon the express assumpsit or indebitatus assumpsit for the value of the goods.

In every sale there is always an implied warranty of title — if no title is found then sue upon the implied warranty or waiving the contract sue in indebitatus for the money —

Burr 2589

1 When a man sues in Indeb. Assumpsit he only recovers the money without damages for he waives the contract.

1 Bl. R. 1078

[illegible] auction —

The auctioneer has printed articles. now these printed terms must govern even if it is proved that the auctioneer made different [illegible] terms at the time. [illegible]

Assumpsit

Equity does many things that the law cannot do — suppose a man has been cheated in sale of lands Chancery will interfere and set aside the contract yet Courts of law will only give damages for where deceit in law will avoid the contract yet even for fraud Courts of Eq. will interfere — and so in Assumpsit law exercises similar power as that exercised by courts of law — in indebitatus aspt 2 Strange 915

A man has pawned a quantity of plate and comes to have his goods redeemed and tendered the money and interest — but B would not take simple interest — but would take 12 per cent — he paid it for he wanted his plate — indebitatus assumpsit lay — objected — that the tendering the money did not vest any interest — after tendering the money he might have brought trover for the plate — and if the money had been paid indebitatus would lie for the surplus objected that he paid the money voluntarily and that therefore indebitatus assumpsit would not lie — the answer was made but the man wanted the plate and he chose the least of two evils — which were either to pay the money or else not have the plate

So this may be refused the case of a Bankrupt for signing the certificate –
So the recovery of the ... of usurious money – But are they not the particeps crimi-nis – I/ no

Analogous case –
At one ... compositions the creditor told the debtor they did not wish to have a law suit but would take up with 10 shillings on a pound – one of the creditors says afterwards that he would not sign an ... the debtor would sign his note for the full value if he gets so much money after the Bankruptcy – he said the note the action failed – for this was extortion and imposition – But had he paid it once could he recover it back – Yes for twas a fraud upon 3d persons

2 M 153

In money obtained by embezzlement betting –
and old feudal objection that in thirting ... you could not recover for the right of suing for the money ...

but this principle does not now apply — A reason from this — when a man committed a felony all his property was forfeited — but in more modern times property does not become immediately forfeited and hence the reason does not apply —

A was nurse to a sick man — she had access to all his keys — now would Indebitatus Assumpsit lie against her who stole his money — yes for she was entrusted with concerns B V P 130

A woman married a man and lived with him some time and he recd elctainments from some of her lands — and after a time she found he had another wife, they parted — she sued him in Ind debitatus for the money so

Il ... C ... 28 and and got it back.

His money you may pursue into any hands to which it comes mala fide — but not to bona fide hands

If A steals B's horse — and sells it you may come upon the horse wherever you find him — caveat emptor — but this does not apply in case of sales at market overt —

A steals B's bag of money — and sells it this action lies not — for this is currency —

any thing that passes in a currency is protected for this is policy — no body would take money if they were liable to have it recovered if it has ever passed through a knave's hands —

A bought a horse of Samuel Cobb and pays a full price — Tom Noakes stole it — the owner comes in and claims it. A says he bought for a full price — T. Noakes says tis his horse — both have equity — then apply the maxim prior est tempore potior est in jure —

Cowp. 197.

Money ~~received~~ ~~[illegible]~~ got on a judgt which has been reversed — Indebit. Assumpsit lies to recover it back —
You cannot then show that the judgt was erroneous by any means but by showing the record of the reversal. Nothing will ever be admitted to impeach it in any collateral way — remove a judgt out of the way and then an action lies —
If it had been a void judgt then you may treat it as a void judgt and the action of indebitatus assumpsit lies — but you cannot sue the officer in trespass for his actions under a proper authority —
But if the Court rendered judgt over things which they have no cognizance the Pltff may be sued as trespasser vi et armis. 2 W. Bl. 131 Cowp. 419

Auction ... by ... [illegible]

At any time between the bidding and the striking down of the hammer a bidder may recall his bid — suppose he is the last bidder — much disputed once) the case is the same he

3 Ter 1218 may recal his bid.

Statute Car 4 says that all contracts for more than 10£ unless in writing shall be void —

Now is the sale at auction within the Statute — no they are not within the Stat — tis not within the mischief of the Stat. for his publicity ...

3 Bur 1921 Bevr 2001 1 Harg 505

Suppose a man knocks it off and does not take away the articles nor pay the money in due time — now in this case the auction eer may put them up and sell them and if they sell for less than before recover the residue —

Suppose earnest is paid — the auctioneer must first inform the buyer before he puts them up the second time — this is the only difference —

1 Salk 131 —

This earnest money is part of the price

1 Termd 719

not determined this case

Suppose a man makes a deposit and bids off the articles and does not come for the articles — is the deposit ... forfeited —

The auctioneer may sue him if he pleases but he dont please then can he get the deposit —

Courts of Chancery say the deposit is forfeited — this view is the right —

A comes to B and wants his horse, and ~~[struck-through words]~~ tells him he'll take 20 dolls and this is to keep him from selling the horse to any other person — now if he dont purchase the horse the money is 1 B W 725 forfeited —

A man has advertised to sell at the highest bidder — the principal has a right to say for how much the goods may be set up at

A sends goods to B and tells him not to sell the goods unless he gets so much for them — well the auctioneer sell them for less — no matter the principal has no right to restrict him —

Camp 205

The auctioneer acts for another — now can the auctioneer bring the action — the auctioneer had not only a possession but a lien which is a special property which is sufficient to support the action

1 Hen Bl 81

The auctioneer liable if he dont fulfil the contract — that is dont deliver them

The book says if he wont give up the name of the principal he is liable — suppose the name is given up and the principal is a bankrupt then Judge Reeves thinks the auctioneer should be liable — Esp ni pi 17

Assumpsit by Judge Reeve November 21-1812

Whenever the terms of the contract are such that the party may return the article — he may return it within a proper time

1 Sp 133 Esp ii 30

~~A sold a horse~~

Bowers and Weston in Camp —

A took a pair of horses of another and paid for them, with liberty to return them if he wished it — he returned them and took another pair at the same price — and so a third pair — he returned the 2d pair and then brought an action with the seller of [illegible] assumpsit this was held not to lie — for by taking the 2d and 3d pair and not mentioning about returning them it was the same as though he bought them — 1 Hen Bl 117

Where the bargain is made it forth right ceases [illegible] as to support this action — A asks B to sell him his horse — A says he will sell

him for 100 dolls - A says I owe him - but does not tender the money - Here this is no contract - but the moment he tenders the money he is entitled to an action of trover for the horse -
But if the is a day of payment fixed in futuro - the law - is his immediately - But here both parties contemplate a future day when they will trade - now one by tendering performance may compel the other to execute his part -
Thus is the mode of discharging the lien -
When one tenders he may sue the other in assumpsit or waive the contract and entirely - or if he has paid his part of the money he may recover it back in Money had & received
A tender is equal to a delivery - A horse may be in the pasture - "go take him when you please" now consent is equivalent to a delivery - this one often occurs -
Sometimes the party is bound to by the contract to deliver and here he must deliver -
But here A directs the mode of convey - me with goods a lot - A the owner must now them for & directs the loss

C. J. 24

Wagers – they may be made in Eng upon indif-
ferent subjects or good – though the Stats
have restricted them wagers in many im-
portant cases such as "interest or no in-
terest" –
Tho' this case came up whether it was not
contrary to good policy – and this lately too –
time and patience are lost by it &c –
But the Courts said that they could not get
over the old authorities. But Buller said
he would not regard the old case & would
not support the action – 3 T.L. 193 – Comp. 38
In Con: no action lies on a wager though
never tried here – contrary to good police –
But in Eng it is within certain restrictions
If it has a tendency to injure 3d persons
tis void – A and B bet upon an expedition
of their country – now this is void for they
may try to defeat the expedition –
Suppose a bet upon the sea
Comp. 1729 strong case –
To support the wager the pro wager must
be upon a contingent event –
in Esp. iii 5 Burr 2203 –
A bet a decree if they would be repealed this
was held not to be a good plea because of the

certainty of the law - But Lord Mansfield says nothing is more uncertain than the law - see 2 the Comp 37 but see your

Under it.

Burr 1886 the true principle is laid down -
It is a custom of London that he who has
hired a [struck] room shall first let his
furniture go to the Landlord for rent
in preference to his Creditors -
The man who hired the room died - and his
creditors came into the room when they met
the landlord who insisted upon his prior right
~~to get the~~ take the goods for rent - the creditors told
him that if he would let them have the goods
they would see his rent paid - now the creditors being
sued plead the want of writing - but he gave up a lien -
If a man gives up a security there will not
be necessary that it should be in writing

But in Bur 282d

If there is a new consideration there will take it out
of the Stat. - no there will not and so Buller
says - for when A is about to ... B
C says don't sue him & will pay ~~for~~
this promise would not be in writing -
2 Will 94 - 1 Will 305 - and to the opposite
no opposition -

2 Mill on the - A brought a suit vs B for assault and battery - and when in Court B tells A if he will withdraw his suit then he will pay him - the court held this need not be in writing - the suit lies here - the retraxit is a complete bar and hence he by withdrawing his suit ~~has~~ lost all his claim and hence this is an extinguishment of B's liability -

2 Th. & O's good con -

When you sue in your declaration you need not ~~prove~~ that the promise ~~was~~ is in writing -

After judgt you cannot arrest the judgt because that ~~the~~ you cannot ~~now tell him~~ - the court as a court could not now tell whether it was in writing or not -

Brit ni pri artles

This action is also brought to recover rent when there is no lease only a parol demise this is founded upon the occupation and not contract for there is no contract It seems disputable whether assumpsit

lies— Stat George says that an annuity will lie— but will it not lie so when there is no Stat— It will and it does lie in this Stat— you must pay on a quantum valebat and not recover the price they agreed upon for they in law did not make any agreement in the eye of the law—

Hutton says Debt only lay at Com Law for use—

Cannot be sued as tenants possessing for the [illegible] by parol

1 T. 378

It is said that a mere voluntary will not support this action—
Suppose a man should see another man's horse in mischief and goes and takes care of him— now this will not support ~~him~~ this action—

Suppose ~~a man sees~~ a poor man goes into a lot of a rich man and works for him all day— nor will Indebitatus lie, no unless he requested it   Holt 108.

What is a voluntary? when a man has lived with another not for any ~~for~~ wages but merely to help and expecting to be provided

for in his will by a legacy and so forth—
but the woman died and gave no legacy—
2 Strong 128 this was a hardcase—
If there was a request to stay and work for
him then there he could recover—

Holt 105

Custom changes the Genl law—
In London when goods are landed for
any person and the carmen takes the
goods and carry them for the owner
now the owner must pay for the
transportation—

Esp di 88

Is of a penny post—he may have an action of indebitatus

When a service is performed—a promise
to pay for it—the result is that there is
no consideration—but this is not law
now—if it is a benefit to him then
tis binding—but let tis benefitting
only to any stranger then if he prom
ises this would not support an action—
but if the

Cith Eliz 282. 184.

When a man is not by law obliged to pay but is under a moral obligation to pay then if he promises to pay this will bind him this is the case with the stat of limitations and infantine contracts—

So when the father of an illegitimate child promises to pay for the nursing of it. this was good consideration

But this will not hold when the contract was void— suppose a married woman gets things and promises to pay—now this is void—and she after coming a widow—promises anew to pay—this action cannot be supported however strong the moral obligation may be.

Bull ni 147

Rule—that wherever a man has paid money upon illegal contract you cannot recover it back—and if it has not been done that is if the thing has not been done you may recover it back— But ~~this~~ in New Hess this case has been overruled— and this is correct For this removes all temptations to break the law—

A gives B to carry the goods ~~to~~ within 3 days 10 Dolls. - now A has got the money - and will not carry the goods - but if he knew he must forfeit the money if he did not ~~[illegible]~~ carry the goods through he would endeavour to carry them -

A man may recover damages in ~~Assumpsit~~ - but how much damages? The promisee may exaggerate damage by stating how much he may have made if he had had his vessel if it was a vessel &c. -
Only direct damages shall be recovered - not remote damage -
That is direct which ~~[illegible]~~ arises from the non performance directly

Assumpsit - by Judge Reeve

All equitable evidence given in by the Deft. will go to lessen damages -
Suppose a man finds money he must publish the finding, and then when the owner comes for the money he must pay the expenses of publishing
One act of our humanity, will support Indebitatus - yet will not lie
A man has ~~money~~ impounded a number of cattle - the owner came for them - he would not let them go - ~~for~~ the owner said they ought not to be distrained for he had ~~[illegible]~~ a right of common

This right the ~~wid~~ distrainor ~~unsp~~ denies — now the object is to try this right — the owner pays the money and then brings the action of indebitatus assumpsit but this will not lie for assumpsit will not lie to try the title of lands — because this right to the distress does not ~~try~~ appear on the record —

Consid 2, 12,

Been questioned — whether an assumpsit can ever be brought besides by him to whom the promise is made. This question only can arise when the promise is made for the benefit of another — Suppose I promise to A.S. to pay 100 — A.S. cannot sue — I pay to A.S. for the use of J. Now can J.S. sue —

There is no case in the books where the ~~ob~~ obligee question can bring ~~the~~ action except

Judge Reeve says the an case -
A about to make a settlement upon his two sons A and B - and he expects to give his daughter 1000£ to be cut off in timber - now the son tells the father if he will not cut his down [?] his timber he will pay 1000£ himself. The daughter brought the action of Indebitatus assumpsit vs the promisor though the prom[ise] is not made to her father and it lay -
Vent. 318 Ash Ebr 184

A put his son who had not more than half learnt his trade to a tradesman who promised to pay 100£ to his son more than to ordinary apprentices - now the child's father promised when the money was due (for a glass of grog) not to sue for the money - the child sued in assumpsit and got it -
manuscript case -
But this action is confined to promises and not extended to Bonds is yet appears from the Books -
Only the promisee or obligee can support the action - But Judge Reeve thinks this may be done upon cases of necessity -

This case came up in Vermont upon a bond and was decided that the action could be maintained. So decided by Ellsworth Chief Justice —

another assumpsits — a general promise to wh. the promisee is not in esse or unknown is said not to support this action — not correct.

A promised to pay 100£ to any person who would ~~pay his~~ marry his daughter B married his daughter and could not get it.

1 Roll 6.

But this is not correct upon principle for how often do persons advertise that if thing are taken up & thief &c. they shall be paid — now this is analogous.

Reeve thinks that the promisee need not be in existence at the time if he arrives within due time —

This occasioned much dispute at Com Law about promissory notes negotiable they were made payable to order — nor no one knew who would be indorsee or payee —

Suppose money is paid into the hands of the agent — can you bring this action ag the agent or must go to the principle — If the agent has paid it over to his principal then he the agent is not liable but if he has not paid it over then you may compel him to pay it over ~~again~~

Cowp 186   2 Burr 1985

With respect to Servants — their contracts made in pursuance of their agency don't bind them but their principals — yet the serv^t may bind himself   1 Atk 212 — 1 Bl 670
Esp Cas 2 & 01 1 T 182

Form of the action of Assumpsit -

The Declaration states only in ~~[illegible]~~ S.S. and so much ~~to pay over~~ to his use and in consequence of such ~~and~~ not ~~liability to pay it over~~ he promised to pay it over -

The practice is to record the writ and declaration - ~~he~~ and the party suing must set down and give the opposite party notice for what he brings this suit - notice is now given in Conn - though not formerly -

In this State you may state this in the Decl. so also when action is brought on a quantum valebat -

In some cases you must give notice When it appears from the contract that the performance was not expected before notice then notice must be given -

In Special Assumpsit you must state the promise as it was and prove it to be so as laid and also state a consideration — what the consideration was &c and then deny that it has never been performed and conclude by demanding damages — also you must sometimes state notice —

All these defects would be bad on demurrer —

Now the right ~~must be ...~~ may be disclaimed by denying the promise or ~~the ...~~ pleading that something has arisen to discharge the Deft since the promise —

As to making demand — when must you make it —

Genl Rule — If the contract is of such a nature as that the man can perform it without being called upon then you need not make a demand —

If A promises to pay B 100 dolls in 3 months you need not request him to pay

But if the contract is such that the man cannot discharge the contract unless being called upon then some

Suppose A applys to a joiner to build him a house - and B says he will do it and performs it

Sea bills - can a man tender any thing ~~he wants~~ he thinks best to get off his poor goods and then for tender ~~[illegible]~~ rags or corn or any thing else - not a good tender

Case in Littlefield of Brimstone and whitstones On a Sea bill a man tendered brimstone or whitstones - this was done in [illegible] - not good

You must generally make notice to the Executor before you sue him as executor

Difference between Notice and Demand

In some cases you must make notice when you need not make demand - When it is unreasonable to sue a man because he dont know of the claim against him - you must give notice

A draws an order upon B - in Salisbury and C who is going up to Salisbury says that he will take the note or order and collect it for him - he takes it but does not find B and as soon as he returns A sues him for the money - he should first make a demand -

A says to B do my business and I will pay you – now B cannot sue A untill he has given notice how much the work amount to –
But when the is general knowledge of the thing no notice need be given and no matter whether the man knew of the thing or not –
In matters of general notoriety notice is presumed –
A uncle of B – promised to pay him 100£ upon his marriage with B – now he married and brought assumpsit immediately vs ~~t~~ A without making any demand or giving him any notice of the marriage – Now should he have given to A notice it was marriage such a general subject of notoriety ~~that~~ as to preclude the necessity of stating the fact to the uncle A –
The court held that not notice need be given –

Action of Account by Some Gould Esq

This is an action sounding in contract
very important for this country that this is
not used in Eng in West courts — they have
bills in equity for the same which is more
convenient than the action of ~~com. fabr~~ of
account at Com law — an action brought
in Eng — in Wills — Goodfrey — an authorities
in Eng —

This action is founded on an express or
implied contract that one who has rec'd
property will render his account for it —
If he does not render his reasonable
account this action lies vs him —
At Com law this lies only ag'st 3 persons
Guardians in soc — Bailiffs and
Receivers — This at Com law is this
between joint merchants but there
as Receivers — 1 Wils 172 of 90 6 & Com Di
tit account A 1. 1 Selwyn nisi P.

But by the 4 Stat of Anne this action extended
to joint tenants and tenants in common
& his co-tenant — the latter being consid

ed or Bailiff 1 Inst 172 a 1 Bac 17

A [illegible] in this action lay only between the original parties themselves nor for or against their representatives the reason was that the contract was founded on such privity as supposed to exist between them

1 Cruise [illegible] account B. D.
1 Inst 89 × 90 - 1 Bac 17

There was an exception in favour of [illegible] the [illegible] of joint merchants but not against them - that it would be [illegible] the survivor to be in favour of the [illegible] of the deceased but this was not [illegible] - the reason was that the [illegible] was supposed to be a stranger and this was founded upon the law Merchant for it would not be in favour of any other

1 Inst 911 b. Cruise [illegible] tit [illegible] B

But the Stat of West 2 - 13 Edw 1. 2 1 Eq 3 extended this action in favour of [illegible] to Guardians bailiffs and receivers - this gave the representatives the power to sue in

These Stats extended this to the Exts of the original Parts—

1 Bac 102 1 Inst 89 b

And the 4 Anne extended this action to the Exts of the Guardians and Bailiffs and Receivers ~~Exts~~—

This Stat also extended this, paravagant the joint tenants and tenants ~~in~~ in common &c—

Then the com. action stands this action lies for and agst the representatives of the parties. 3 B C 163 1 Bac 17

In every case except that of Guard or in sa case the Deft is charged as Decl as bailiff or receiver or both— Now it seems here the joint tenant was not bailiff nor receiver He is not sued as joint tenant but a bailiff— When also a joint tenant is sued he is ~~per~~ sued not as joint tenant but as bailiff and receiver— these Stats have not multiplied the kind of persons who may sue— for the person must be Guardian Bailiff or Receiver—

Com Dig tit acct E 2 A 3

Lib V B 116

When I say that the joint tenant is not sued as such I do not mean that he is not named as such, it means that he is not sued eo nomine — he is sued as Bailiff and then he shows that he was joint tenant and therefore was receiver one should account — the relation in which they stood must appear —

The Deft is charged as bailiff or receiver or both —

A Bailiff is an agent who has the care of cattle for another to improve for the owner and who is to account and who is entitled to a compensation for his trouble

1 Inst 172 A

And the bailiff is bound to account not only for those which he has made but for those which by common industry he might have made — he must compensate then he may spend his own negligent or ignorant accounting —

1 Inst 172 A Comb [illegible]
1 Salk [illegible] 1 Bac 19

A receiver is one who has rec'd money for the use of another but has no reward for his trouble — he does not improve it, thus if a Steward receives the rent ~~of the~~ he must account and this too with out any commission. he is servant or is paid so much by the month —

We suppose A receives money due on a debt on bond for B — A is accountable to B in an action of account — he does not traffick with it. 1 Inst 172 a. 1 Rolle 119

Com Dig A 2

But both [illegible] which the receiver receives no reward and is not accountable for profits this is an exception in favour of Joint Merch^ts — 1 Com Dig Acct E 10–13
1 Bac 19.21 1 Inst 172 a —

It follows from this distinction that a Bailiff cannot be subjected in a declaration charging him as a receiver since by this he would lose his reward — which he ought not do — 1 Inst 172 a 1 Rolle [illegible] 119
1 Bac 19

We see a Stat extending this action to Joint tenants and tenants in common and coparceners and also in favour of and agst their representatives.
It does not lie in Eng at all in favour of Coparceners.
But Stat extends the action to residuary legatees vs the Exr.
Stat Car 2

The legatee must be residuary — for when the legacy is specific there is no reason for the action Stat 2 &

Our Stat does not extend the action to Exrs of bailiffs — but our courts of law have extended this in accordance with the Eng rule —
And so in favour of the Exr —
In that case this action will lie under the English Stat it will lie —
common practice —
This action is founded upon a privity
It will not lie for a tort then — for there is no privity between the parties — no contract either express or implied.
An Exr in Eng at Com law in favour of the

Liery and infants — In the case of being an infant may elect to consider the tortfeasor as guardian or as other possessor —

It is then incompetent to say in such a case to say that the deft was a tortfeasor

Cases cited out Bac. 11 Vol 89 — 2 Burr 295 B.C. 2 T Burr 235 1 Atk 481

It is said in some of our books that this action will not lie for a sum certain — but Gould says this is supposed to be incorrect —

The true rule is for a sum certain a person cannot be charged as Bailiff but he may as receiver

Thus if one deliver wool to another to trade with and to account with him for the profit he cannot be sued as Bailiff for wool but he may sue him as receiver and he may charge him as Bailiff and sue him for the profits — Cases cited Co. Litt 172 1 Bac 19 / 2 Bac 16

So if the deft receives a sum of money upon an execution he may be sued as receiver — Hob 206

So if my agent receives money of [illegible] for me this action lies —

And it is agreed with this if one receives money to pay over to another the action lies —

1 Inst 172 a 1 Bac 20-21'
2 Mod 107' 1 Com tit Assumpsit,

If A receives money of B to be returned me upon some certain event B may have this action against him as receiver — if he has paid it over to my creditor this is your accounting —

Com dig action A 2' 1 Rolle 115
Fitz Nat Bre 116. 118, Sid 153

If money has been received of A to the use of B — B may have this action but B must declare of whom this money was received — for the action generally this will appear as receiving from himself

1 Inst 172 a 1 Rolle 120
1 Com dig action A 2'

But if I deliver money to A etc to deliver over to B for my use I cannot have this action against B for he was not privy, if there is any privity this may alter the case —

Com dig' B 2 1 Rolle 118'

If A bailee ... or refuses to deliver them this action will not lie though trover or detinue or assumpsit because he does not receive them to account

Com dig action D 1 Bac 19 1 Rolle 145'

he cannot be charged as receiver for he did not receive money — nor did he receive money for the use of another and to account for them — A mandatary does not receive to account for the use of another and a act for

It does not lie agst disseisor for the profits of land — Com di acct A-3 — 3 Lord 221

If A's bailiff makes a deputy A cannot maintain this action vs the Dept for there is no privity —

1 Rolle 118 Com di tit acct D-

An account will not lie agst an infant though he is liable for his torts — he is liable for necessaries and may be sued in a proper action — they are inevitable to contract and also to account — the object of this action is to compell the Deft to account — 1 Rolle 117 - 8 Inst 172 a

Com di tit acct D.

If he who receives property makes an express promise to account the owner of the property may either maintain an action of acct or an action on the express promise — Ld Holt says that in the action of assumpsit the Plff shall not travel into the particulars of the acct — but must confine himself

to Harvey he ~~must~~ has sustained by the not accounting

Selby v Corthien 4 Esp 98
Peake 104 354

Hence an action on Assumpsit will not bar the right to an action of account — for they are not brought for the same thing

1 Bac 20

Court think the action is reasonable for it would be very inconvenient to go into a statement of facts before a jury that to make an account before a jury as must be made between themselves — there has been but one case of this kind and indeed but few cases occur of that of any kind

Where by deed acknowledges the receipt of property to be accounted for to the party has his election to sue upon the deed or to bring an action of account — The deed was intended to enforce the debt — The action ~~[illegible]~~ of debt will not merge for when a higher remedy is to given to enforce the performance of a lesser contract the higher remedy does not merge

1 Roll 118 Acct Ele. 844 1 Mon 219 223 & 125 & H 197

If one person finds the property of another this action does not lie for he is no privity - the proper action is trover if a refusal is made -

Com dig tit acct letter B

In this action if the Plff prevails there is always two judgments - and in the case of a prevailing in the first so

1st is a judgt quod computet.

But the Plff is not entitled to recover any ~~[illegible]~~ thing unless the Acct is proven ~~too~~ -

If the first prevails auditors are appointed - 1 Wils 99 1 Mod 42

Com dig tit auditors 15

The auditors being appointed the parties must meet before the auditors and the acct must be taken before them - and after the report made by them a ...

judgt is rendered – this report resembles a verdict of a jury

If Judgt is for Plff the judgt is quod computet 'that he account' 3 Bl C 164 11 Co 40 A –

(Sel ni pri 7–9)

Under the Stat law of Conn't the parties are permitted to testify and may even be compelled to testify and upon re[fusal] to testify he may be imprisoned until he will answer or testify – for this is contempt – Stat 28'

If the Deft refuses to account & to produce his acct or refuses to attend the auditors must give the Plff his whole demands with costs –

Cok Ent 816 3 Wil 117

(Com di E 15')

By our Stat it is provided that if the auditors find a ballance in favour of the Deft they may award that ballance in his favour and then judgt with [illegible] costs – also But at Com law the Deft could recover nothing –

however by a bill in Equity they may in Eq'y give a Deft his allowance—

1 Bac 60 2 Mass 150

But the auditors meet out of the court and they return their report into a court—

As to what a Deft may plead in Bar.

In ~~Abatt this~~ is much contradiction—

Genl Rule— It is competent for the Deft to shew any thing which goes to shew that he is not bound to account— This plea is put in before Ct before the first judgt is rendered— ~~that~~ he was never Bailiff nor rec'r nor a Bailiff— so never Guardian nor receiver—

Com Dig c 4 1 Rolle 124
1 Bac 20

So also a release all actions— for th he has released all claims he has now to this—

1 Rolle 123 4 Bac 85

The Deft may plead in award of the arbitrators that he should be acquitted of the action— for such extinguishes

1 Roll Ab 824 Bac 87

Also if the Deft pleads that he was to deliver it to a Stranger and has delivered it over this is a good plea — for if so he is not liable to account —

Com Dig Acct E 5

1 Roll 122 6 — Co Litt 88 303 3 Mill 114.15

All these pleas show that he is not liable to Account but where he confines them — because the plea in bar should be such that shows the Deft should not account as good — any plea which does not show that he is not bound to account is not good

Thus if the Deft pleads he has paid to the Plff, or tender for payment is not. account — he admits his liability in pleads something which does not show his discharge — 6 C 7. 4 Bac 84 —

But a plea in bar that the Deft has fully accounted is good — yet this admits that he was liable — but the whole demand and [illegible] has been answered —

3 Mod 113 Com Dig [illegible]

But upon a plea of pleinement he may not go into the items of acct — for this would be to go into the account before the court — whereas it must go to the auditors

1 Root 225 —

Gen rule — If the def. is once liable he cannot plead anything specially in bar except something equivalent to release or a release itself

If he has anything besides this to plea he must do it after the grand computation i.e. before auditors

3 Wils 73 — 113.14

And all defences except such as go to shew that he was never liable, must be plead specially — because they are inconsistent with the general issue

3 Wils 113 — 14 — 2 Impl 149-50

After judgt of quod computet and before the auditors may join issue upon some matter of law or fact — but said in Brig this plea must be tried before the court but this is not correct for in plea of nothing in arrear — must be tried by the auditors — But in issues in law they must be returned to the Court 416

Com Di A. C 11 — 3 Wils 49 — 117 Took Ehi 24

And also former assises - [illegible] a fact - but the last found is tried in Court by the auditors -

Gen'l rule - that whatever can be pleaded in bar must be pleaded before the Court and can not be pleaded before the auditors - and what ever can be pleaded specially must be pleaded before auditors and cannot plead this before Court - and if the Deft can plead this in Bar before the Ct if he does not avail himself of it in the Court he waives it -
Cart. Chs. 182 - 16 [3] Mod. 73 - 101 - 113
Lev. 219

Nothing can be plead before auditors contrary to what has been pleaded before Court -

Hence before auditors he can never plead that he was never bailiff for the judgt necessarily implies this else they would would not have given a judgd computet - and a release cannot be plead before auditors
Nor can he plead that he has fully accounted for this would defeat the judgt of Court -
Nor can he plead an arbitration that he should be discharged for this is bar
Cart. Chs. 82 1 Mod. 113 - 2 Bay 176

5

On the other hand — it is good accounting for the Dept to show any thing before auditors that he is not now liable —

For if he is not liable he must show it some where — if he cannot plead specially in that then he must be permitted to plead it before the auditors —

Then if a carrier throws goods overboard this must plead specially — for he was once liable though not now — for twas necessary to throw them overboard —

1 Inst 89 a Sarah & Molle 128
Com di aute 11

So also if the property has been by robbers without his fault, this is good accounting — for this is the proper and just mode of accounting

di Coke 84 A — 1 Inst 89 a
Com di aute e 11.12 Strang 680 [18]

But it a plea that the property was sold on credit and that he the Dept sold it on credit is not good unless he has authority to sell on credit

2 Mod 100 1 Bac 21 Com di aute e 12

And a Bailiff in his accounting is allowed for his expenses — this does not hold in the case of the Bailiff of his own wrong —

Is not competent for him to say the items of the conspect (?) ... 1 Mert (?) & 2 c.t Commissioners 12
13 Kern (?) 19

A receiver is not allowed his expenses
1 Mat 1172 c.t
Commissioners

Because has to use no trouble he has only to keep and account when required to -
Sect 30

Rules of Account - In case when an action is brought before a single magistrate and he tries both issues the stat does not permit him to appoint auditors -
Stat 28 - 2 Supp 151

Our Stat also provides that on an action of book debt the single magistrate may for a sum exceeding 17 dollars may appoint auditors as in account
Stat 28

When a judgment is made on an award of ~~auditors~~ auditors no appeal lies from it to county of Com. Pleas - On Any the Pltff is not entitled to a discovery

of th Defts propensor his oath
1 Bar 16 3 B C 437 381 &c
Wat on Partnership 228

Contra th one State has given to auditors in an act all th powers (virtually) of Ct of Chancery — Hence our auditors have as extensive jurisdiction

Cmellars [illegible] [illegible] this action of acc will not lie [illegible] the adjustment was to be made between more than 2 partners

Boardman vs Seymour
Litchfield county.

The reason it is impossible for th court can settle th claims of all of th partners — I sue A and B — then these Defts must sue each other again — for th court can only settle th adjustment between the Plff and Defts and not th claims of all th parties —

The proper remedy is by a bill in Chy when th parties may be ever so numerous —

If either party is dissatisfied with the award he may apply to th court
1 Bar 21

But what precise facts the court will set
aside the award is not well settled.
1, Some points are clear — if the auditors
have exceeded their commission in their
award may be said set aside.
1st If they have made a mistake upon their
own principle — this is good cause
for setting it aside
So also if the auditors mistake the
facts — so for any corruption in the
auditors — 1 Mass 208. 4 [illegible] 113. 2 Day 115
The mode of excepting to the award is
by a written remonstrance presented
to the Court — the Court will not generally
enquire at large into the facts — but if such
mistake complained of can be ascertained
from the examination of the auditors
themselves in court — it may be done
so if it appears in the writing itself
Kirb. 35 3d Mass 157.
2 [illegible] 2 Day 116

Detinue — very little to observe upon this subject —

This action lies for ~~a thing~~ the recovery of a specific chattel and is in its effect like the notion of a bill in Chancery —

The suit is not for damages but for the restitution unless the thing has been destroyed in which case there is a clause which says that the value shall be paid —

The first remedy is then restitution

1 Inst 286 3 Bl C 152[d]

Cro Ja 361 2 Bos & 45

But as this is brought for a specific ~~performance~~ restitution it will not lie for personal property which cannot be identified — thus detinue will not lie for money or for corn — for these cannot be distinguished by the Plff

1 Rolle 606 [illegible]

B — 2 Bur 487

But tho the action will not lie for money yet it will lie for a piece of money or money in a box in a bag if it can be identified — then the reason for its not lying for money is not ~~for~~ because they are not considered B — Bul Ni Pri 457

This only lies in those cases where the Deft obtained possession of the chattel lawfully
Another reason is that action is founded upon a contract — Judge Swift says this sounds in tort — not so says Gould and hence Debt and Detinue may be joined in one Declaration — but torts cannot be joined with actions sounding in contract

Com Dig. D. 1 Rolle 607
3 Reeves Hist 67. 1 Bac 11
1 Bac 28. 2 Swift 20

The action of Detinue is in its general nature the same as the action of Debt — This is an action of Debt to recover a chattel
Debt lies to recover my money —
Detinue lies to recover my chattell —
3 B C 156

This action will not lie to recover money lent because this is not to be specifically restored — 2 Bac 287. 1 Rolle 606

The action of Trover has become conve-
nient with trover and trover will lie in all cases in which Detinue lies at common law but this is not true vice versa

When the tenor uncertain the customary
Distress - that is not the gist of the action
is a distress -
This action lies of an Ancient writ of
use - It never was attempted to be
in Court - It has been discussed in Eng
because the Lessor had a right to [illegible]
his lan -
Another reason on account of the uncertainty of the argument of the thing demand
ed - Fewer is better - & no strictness
is necessary
The action of [illegible] is given by statute
Westm 2. 13 Ed 1 and was not known at
Com law - and action on the case was not
so much known at Com law -

11 Co L 87 a) Co L 124
Yel 178 2 Bur 415

Covt broken

Actions on Contracts by Aimes Y vol 2 ed

1 Covenant broken - this action is founded on a covenant and claims some recovery for a breach of it. Hence the name of the action. Covenants, Contracts & agreements are sometimes used as synonymous - But they are not strictly so for tho every Covenant is a contract & agreement every agreement or contract is not a Covt - Ev^y Covt is a contract or agreement reduced to writing and sealed - Contracts and agreements are a genus of which Covt is a species. Covenants may be either by indenture or by deed poll 1 Bac 526 Fitz 340 1 Wm Bl 224.5 Esp [illegible] 266

Though a covenant be in form an indenture yet if sealed only by the Covenantor it will support an action - Croke Eliz 212

On the action of Covenant broken the usual remedy is in damages - but debt may be brought when the Covt is for a certain sum or where the damages may be reduced to a sum certain by averment Chitty 189 Buller's N.P. 167.29

Thus if A covenant to pay B 100 dollars or to pay him 2 dollars for all the wheat B may bring before such a day debt will lie - In this case damages may be assessed to a certainty by averring that B sold so many bushels -

But tho the usual mode or remedy for a breach of Contract is for damages yet when the Contract is to do some specific collateral act or to convey land the most usual and proper remedy is by a bill in Chy for a specific performance

1 Bro 520 Cont 2 4 134 136

But when the Covenant entitled to Covenantee to damages only, a bill in Equity cannot ordinarily be maintained. Then a Ct of Law can afford adequate remedy - and such damages are not to be ascertained by a Chancellor but by a jury - Thus if a Covenants to pay B a certain sum of money or to deliver him a certain quantity of any Personal Chattel a bill cannot ordinarily be maintained - It is an adequate remedy at law - and the rule is that they will not interfere where

1 Pr Wms 370 1 Bro 520 1 Dan 429 Bunch 241

But in such case if th[e] which is collateral to some ground of relief [illegible] thereby cognizable by that Court (i.e. Court of Equity) Chy will grant relief. As if A sues B at law for breach of covenant B files his bill for an injunction on the ground of fraud. Here A may file his cross bill and if no fraud is found Chy will afford him relief. Here A could not originally have filed his bill in Chy but his relief is collateral to the [illegible] which by the bill of B is brought before the Court. Tho[mps]on v. A 17 | Ba. 57. 52 [illegible] 2 Ver. 415

This rule is sometimes differently expressed thus. When th[e] remedy is in damages only, recourse may be had to equity if matter of fraud be mixed with the damages.

In the example which has been given it is the English mode to direct an issue before a jury to ascertain the damages unless they appear upon the face of the proceedings for th[e] Chancellor never ascertains damages. In the Con[necticu]t the mode is to refer the question as to the amount of damages to a Committee appointed by the Court for that purpose. But if the parties wish the Court will estimate them.

Covenants may be divided into two kinds
Covenants in deed and Covenants in law
or more intelligibly into express and implied
A Cov'tin deed is one where the Cont is clearly
expressed in words or directly — where
in grant of lands the Grantor covenants
that he is well seized — [illegible]
A Covenant in law is one raised and implied
in law — thus if a lessee &c for a particular
time the law implies a covenant of quiet
enjoyment during that time
Phil 384, Co. Litt 280
This division of Covts arises from the nature
and form of the agreement — but there is
another division arising in a different
way
All Covts are either real or personal
this division is according to what the Covts binds
relate to the other. A covenant real is one
by which the Covenantor binds himself
to pass or assure something real as
lands tenements &c. Phil 134 Co Litt 3-13
A personal Cov't is one that is annexed to the person
or concerns the personalty only — thus a Covenant
to serve as apprentice for or any ~~other~~ act

for another – a cov't to pay money to deliver any personal chattel to build a house & is a personal covenant 5 Co L 16-17 – Fitz 145

This last division of covts arises from the subject of them whether it is real or personal you resort to the subject matter

No set form of words is necessary to constitute a cov't – any words reduced to writing and sealed which shews the intention of the parties to the contract amount to a covenant Thus if A makes a lease to B with this clause A reserving so much rent or to pay so much rent this is considered an express covenant by the lessee to pay that sum

1 Burr 291 Roll 518 1 Lent 10 1 Lev 47 2 Mod 86 Cro Eliz 202 206 557 1 Bow C 242

A covenant may be made as to a thing past present or to come – If A covenants to convey land to B at a certain time and at the same time covenants that he has bot the land of J. S. when J. S. still owns it this is a covenant as to a thing past So if the lessor covenants that he has made no prior lease though he has he is liable on that covenant

Is a grant & the Grantor covts that he is well seized this is a covenant as to a thing present — But Covts are generally as to things of future. Executory contracts under seal are all generally future. Plowden Com 308

Covts in law differ from those in deed in this respect — the latter are founded on the words used as amounting to an express covenant tho the words may not be in strict — the other are implied not from the words but from the nature of the contract or agreement — thus from the words demisi & concessi the law implies a covenant that the grantor has a good title and that the grantee shall quietly enjoy, tho there is not a word said in the deed about title or quiet enjoyment
Plowden 308 2 Coke 81 b. 5 Coke 17 Croke Eliz 98 1 Mod 113

And I think in such case an action will lie before the grantee is evicted — and this seems to follow from the form of the implied covenant — that he has a good title — After the grantor is evicted there is no doubt but that an action will lie — and I conceive it will before the

Covenant is broken as instantly in which it is made
If the Covt were that he was well seised, if he was not an action would lie immediately and I don't conceive that it makes any difference that the Covt is merely an implied one 4 Co 80 Carthew 118 - Ross ar 207-8

But Covts in law are always restrainable by covenants express in the deed-
The maxim is Expressum facit cessare tacitum, i.e. When there are Covts express the law will not imply a contradictory one—
As if A leases by the words demise et concessi & and there is afterwards an express covenant that he nor no one claiming under him will evict the lessee the law will imply no Covt as to a third person not claiming under him—But if in this case there is no express Covts the law would imply one agt the entry of any person whatever—In contemplation of law the lease with the express covenant amounts only to a quit claim for during time of the lease of the lessors right 1 Yelv 175 4 Co 80 Cro Eliz 673-

There is a rule laid down in Croke Eliz. and Cro. Jac. not expli-
citly expressed and which without expli-
cation would mislead - It is there said that
the words dedi et concessi, imply no [in action]
covenant as eviction by a stranger - this
must mean a tortious eviction or else tis
contradicted by every authority on this subject

Cro. Eliz. 214, Cro. Jac. 268

As to tortious evictions, an express covenant
for quiet enjoyment would not bind the
covenantor - this you will easily see must
be the rule by comparing it with the
other authorities on the subject especially
4 Co. 80 - 4 Co. 80

A recital of a former agreement in a deed creates
an express covenant - thus, if in a deed it
be said this indenture witnesseth that
whereas it was agreed between A. and B.
the parties that A should pay B 1000 dolls
it is hereby further agreed &c. this is an
express covenant by A to pay B 1000 dolls
But with case of covenant in deed if the word
covenant be not used there must be some
other word importing an agreement otherwise

there is no covenant and the action of debt broken will not lie - As if the lessee covenants to repair provided the lessor will furnish timber - This proviso is not a covenant of the lessor that he will furnish timber but merely a qualification of the lessees covenant - If the lessor does not furnish the timber the lessee need not repair but no action lies against the lessor for not furnishing

1 Roll Ab 518 Cro Eliz 207

But if the words in the case had been provided and it is agreed that the lessor shall furnish &c this would have been both a qualification of the lessees cov and an express cov on the part of the lessor -

Again if a lease be for life provided that if he die before the end of 20 years his Executors shall have it till that time this is a cov and not a cond to the est - It is not a case for a cond must be certain as to the beginning and end - It is not a qualification of the est - to last for life but something in addition to it - The words of cond

are in the form of a proviso yet they must operate as a Cov't or not at all - But in such cases words in form of proviso must not be construed as a covenant unless they were plainly intended by the parties - 1 Coke 155 1 Roll. 518 1 Mon 478 (Fits hugh 27)

It is a very common practice in England for the Lessor or other Covenantor to enter into a bond conditioned for the performance of the Covenants - this bond extends to implied as well as express cov'ts Thus where A leases to B by the words demise at concessi &c & gives a bond, an action on this bond will lie if he has not a good title - 4 Coke 80 b.

If a lease contains a clause provided & and on Condition that the Lessee does such an act - this is not a Covenant but a condition to defeat the estate - If the lessee does not perform the act therefore the action of Covenant broken will lie - And whenever the Stipulation is in the nature of a defeazance an action at law will neither lie as on a Cov't 1 Roll 518 1 Co 418

As if A executes a penal bond to B with
condition that if A before such a time
convey to B black acre - this is a good
defeazance and not a covenant to
convey such land -
But a Court of Equity may decree
a specific performance of the contract
and direct the land to be conveyed -

Actions on Contracts by James Gould Esq Oct 10. 1822.

Construction of Covts

They must be construed liberally - that is the intention of the parties must be sought without that strictness which is used in grants and deeds - the words heir or heirs are indispensible.

5 Th Co 1 Bland 121 Rol 419

1 Bour 549

Therefore in many instances a literal performance is not all that is necessary - thus in bond conditioned to be given up at such a day is void or

Cro Eliz 7 Bac 418 Esp ni 270

So Contra A substantial performance does avoid the covenantor even tho tho tis not literal - thus wh ~~a~~ agreed to give B so much if his son would marry his daughter his son married before the time appointed

Sel Com 52 Esp ni 270 Stray 804

1 Hen & Bl. 276

When A covenanted to deliver a piece of cloth to B - A first injured it wantonly and then delivered it this was not a performance according to law though it was literally

Th Stray 4 68 Shinne 3 26

1 Bou 429 442 Esp ni 271

And upon covenant to pay 50£ this means ~~weed pound~~ mere deposit 1 Sid 151

When the words of the Covt remain uncertain

they must be taken most strongly ag'st the Covenantor - and beneficially for the Covenantee -
1 Bur 5 264 1 Sid 151 1 Lev 172 Esp. on 335

And if one covenants to do something as to convey a piece of land on such a day now the conveyance of that land to another before that day ipso facto makes a breach of the Covenant - for the Covenantor makes it impossible for him to fullfill the Covenant - Gould says this seems founded on insufficient reason. 5 Co 21 et 7 do 15 et
Moore 313 323

There are some cases in which exceptions in a lease will amount to a covenant and some cases when twill not
When the lease is a given subject excepts a particular part, the exception does not operate as a covenant that the lessor will not occupy that part
A leases B. block on except - such a particular inclosure - now if A enters into the inclosure and does not disturb B no action lies
But when the exception is of a thing to be derived out of the property or thing leased - this is a covenant
A leases to B an office except the right of passing through it once a day - now here is a covt that A may enter and pass through the

the assign or the lessee to set with this incumbrance
Salk 196 Carthew 232 — Cooke Eliz 657 690 1 Rolle 131
Com dig tit waste E 2 — It makes no difference whether
the lease is by deed by indenture or deed poll —
though Powers only mention the former 1 Powell 238
Difference between construction of Express
and Implied Covenants the former are
construed more strictly —
If one cov't to perform a voyage within
a given time the covenant is broken if the
voyage is not performed for the covenants the risk
2 Wentworth 188 8 Sh 259 — 1 Burr 637 8 East 233
So if one covenants to pay rent for 20 years the
rent ~~must~~ must be paid though the house is
~~perform~~ burnt down — Thomp 703 1 Sh 1108 6 10
2 d Ray 1477 1 Fonb 360
Been questioned whether a court might ~~not~~
relieve the lessee in this case — few opinions
that the lessee can be relieved
1 Chan 83 1 Fonb 671
In the case of implied covenants ~~with~~ otherwise
as cause — thus every lessee enters into an
implied ~~cov~~ covenant not to commit waste
but ~~th~~ if the house is burnt by lightning the lessee
is excused — 3 Burr 1639 1 Fonb 300 — Doug 259
But the performance of express Covenant
not be discharged by any collateral matter
Esp dig 270
but there are some exceptions — thus if one

covenants to do something which at the time is lawful but which becomes unlawful by some statute. here this excuses —

Salk 198

So also if one covenants not to do a thing which is lawful but afterwards a statute enacts that such thing should be done this excuses —
Thus if apprentice engages not to leave his masters service and is drafted to fight he must go forth law compels him —
Gen rule — Covenants are confined in their operation to that which is in being at the time of making the Con[t] —
Thus if in a lease the lessee covenants to pay all taxes this means only such taxes as are laid at the time and if afterwards a direct tax should be laid the lessee would not be liable to pay this for this was not in being at that time — Rev 68 1 Leon 223

2 Strange 1101 3 Bac Ab 377

This is not founded on any arbitrary principle but upon the intention of the parties —
A Cont contrary to good policy is void

2 Burr 2225 Comp 729

3 Bl 17 1 Powell 134

If one leases a personal chattel to another and the chattel becomes useless during the covenants for want of repairs it has been questioned whether the lessee is bound to pay — or is the Cont

broken 1 Bac 531 1 Vent 35. 44 1 Lev 229 1 Saund 321

An assignment of a chose in action when by deed amounts ~~th~~ to a covenant that the ~~lesse~~ assignee shall have the legal title and may reduce it to possession — Choses in action are not negotiable at Com Law. If the assignor therefore after the deed of the assignment the assignor becomes liable to the assignee in an action of Cov.t broken —

Salk 125 - 1 Mon 317 2 Roy 638
3 Rolle 324 Chitty on Bills 109

A parol assignment will also give the assignee a remedy — for a chose in action may be assigned by parol — agr.

2 Ph 10

In Cov.t when the chose is released after the assignment the usual action is an action of fraud. In Eq'y the only remedy of the assignee is in Chancery formerly so —

Covenants are construed according to their legal effect and must be so carried into operation

Though a Cov.t not to sue within such a time is not a discharge yet if it is not to sue at all it is

Cro Eliz 352 1 Show 46
5 Lev 211 Holt 10 Carthew 63 Salk 575
2 Henry Bl 10 note 1 Burlem Fut 633

Contra at Covenant never to sue is a release and may be pleaded as such 8 Ph 1126 4 280 Com Dig 95
Cro Eliz 352 1 Ph 446

The reason of the difference is this - if the cov't not to sue within a limited time was a release it would be a perpetual bar - per se bar. Personal action is suspended for a time it is suspended for ever - But where the Cov is not to sue at all - the case is different. This is to prevent a multiplicity of suits. If a covenant not to sue within a time makes a part of the instrument sued upon this will destroy the right of action during that time - for instance if the Covenant is endorsed on the back of the - for take all the instrument together and there is no action ~~[illegible]~~

4 [illegible] 21 & 3 C [illegible] 737 2 Ld Ray 64.
Rev 152.

And the rule that a Cov' not to sue does not amount to a bar to sue during that time applies only to personal actions for it is so that a real action is different

2 Henry [illegible] 4

And if a covenant not to sue in a foreign Country is ~~[illegible]~~ a local release but not an universal bar - for it may be sued in another Country

2 Hen [illegible] 171

One ~~[illegible]~~ cannot by Cov't so exclude himself from the courts of law in one's own country Thus if A covenants that if he be [illegible] he does not pay he will not sue at law but

bom A to arbitrament - this Covt is void on the ground of good policy 2 Hen 6 06
A Covt not to sue one of two joint and sev obligors is no release covt to the other nor to one of them - for such a covt is never construed into a release wh the right of action is not given up -
If the obligation is joint - a discharge of one discharges both, for one cannot be sued alone
Ind. Lo. 188 2 Ld Ray 690
Wheat 264 R Mod 554
A release informal in form to one of two joint and several obligors extinguishes the bond -
8 J.R. 108
But if a Creditor grants to Debtor that he will not sue and if he does such grant may be plead in bar - this is a conditional acquittance and amounts to a conditional release -
The words of defeazance are here added - which destroys the right of action -
1 Bulle. 134 Carthew 64 210
Com 123 5 Bion 28 330 350
2 Show 161
There are certain covenants ordinarily used in conveying which require particular consideration - In General in all conveyances except releases or what are call release quit claims, there are two covenants either express or implied -
1st A covenant of seisin in the freehold or that the Grantor

is well seized or has a good title in any conveyance & A covenant of warranty or that the Grantee his heirs shall quietly enjoy— If these covenants are not expressed they are implied by law— These covenants then accompany every conveyance unless there are some exceptions— In quit claims the covenantor covenants expressly that the covenantee shall enjoy without let or hindrance from him or any one claiming under him— This restrains the implied covenants which would otherwise arise— 4 Co. 80 b.— 1 Rolls 519-20

On a covenant of seizin or that the Grantor has a good title. The grantee may maintain an action before he is evicted for the covenant is broken as soon as made and an action will lie immediately Comp 304 130 9 Co. 60. Kirby 3d. It is sufficient to shew that the grantor had not a good title. But on a covenant of warranty the covenantee can maintain no action till he is evicted— the form of this covenant is I hereby covenant for myself & heirs I will warrant and defend the Grantee &c against all demands and claims whatever— As long therefore as the Grantee quietly enjoys he cannot maintain this action for the covenant is not broken Kirby 3d. Cro. Eliz 919

In an action on a covenant ~~broken~~ of seizin it is sufficient assignment of ~~the~~ a breach to state that the covenantor was not seized— It is not necessary for the Pltff to state who was seized— This is laying the breach in the terms of the covenant— which is generally the best way— the Deft—

must then shew that he was seized — If he shews a prima facie title the Pltff must then shew a higher title in another — But if the Defts shews no title he must then fail —

2 Espinasse Cook 307 9 Coke 60 Cook 170

And a covenant of seizin is broken by an existing incumbrance on land unless the incumbrance is excepted in the Cont — Thus when a Mortgagor covenants that he is well seized the mortgage is a sufficient breach of the Cont — I think this to be the rule as well in Eng as here — though the books are not clear Sanford vs Washburne in N.Y. 3 Hart 241

In this state there can I think be no doubt for the covenant is that there is no incumbrance ~~on his covenant~~ whatever — and I think that the covenant of seizin in its usual form implies that the covenantor has a full and legal title —

On a covenant of warranty I have observed there can be no recovery until after eviction, and the Pltff must state in his Declaration that there was an eviction — that it was made under claim of title & that under a good and older title than his own —

If he merely state that he was evicted by such a one under a lawful authority this is insufficient for he may have been evicted by one claiming title from himself—
4 Coke 80b Cro Eliz 815 1 H B 3.5
1 Mod 292 2 Saund 177

But if it appear from the declaration that the eviction was under elder title it need not be stated totidem verbis.— But it is best generally to state it expressly.— 3 Lev 37. 4 T R 617
8 Vin 278 a. 2d
It is not however necessary for the Deft to state under what title the eviction was made.— It is necessary however to state that the person evicted had a fee simple or fee tail or that he derived his title from such or such a person— then for the Pltff may not know
It is sufficient to state that the eviction was under good and elder title 2 Lev 324. 4 T R 614

In Siderfin and Saunders it is said the declaration must shew under what title the eviction was made— the meaning must be that he must shew and elder title— If they mean more tis not law for it has been overruled— 1 Sid 2.08 - 2 Saund 177

The reason why the eviction must be stated to have been under any title is that the covenant was not meant to extend to tortious evictions

but merely to ensure the title to the grantee &
It is therefore ~~under~~ indispensable that it be
stated that the Eviction was under title —
Alleging that the eviction was under a judgt
of Court is not sufficient — for the judgt is
not conclusive and cannot be given in evidence
~~under the general issue~~ in this action the
grantor not having been a party — and besides
the judgt upon which the eviction may
have been obtained by virtue of a title from
the Grantee himself —

Strong v. oo Hob. 323 — 384
v. do 610 Arch. Eliz 917 v. Cr. Eliz 80 B

These rules relate only to ordinary covenants in
conveyances — for the grantor or any other person
may covenant against the tortious acts of all
the world if they please. It is not necessary
in such case to state that the eviction was un-
der good and elder title — It is not to be supposed
that any man would be fool enough to make
such covenants — but if he does he must
abide by them Esp. ni 273 — v.

And a covenant of warranty as the eviction
by any particular person or persons extends
as well to tortious or other evictions by them
This is supposed to be the intention of the
parties Hob. 45' Rob. Eliz 212 Stacey v. oo 1 Roll. v. 33

But if the Covenantor disturbs even by a tortious act under claim of title he is liable on his ~~coven~~ covenant if not under claim of title only as trespasser - thus in an action on cov't it is not necessary for the Plaintiff to allege that the Def't has any title - He holds that the Pl'ff must allege that he was evicted under title extends only to lawful evictions. This rule is laid to allude to the claims of third persons only - and the Covenantor cannot when he enters under claim of title say in his defence that he did ~~not~~ enter under such claim yet that he had no title -

[illegible] Saunders 125 Esp. Di. 2733

I will now observe on account of the connection that an eviction by the lessor suspends the rent - but one by a 3 person does not - after the lessor has deprived the lessee of part of the land in which the rent was to be paid he ought not in justice & reason to claim the rent and such is the law that he cannot Com. p. 2d.

Another rule last mentioned before this extends to all persons included in the Covenant by operation of law as heirs Ex'rs and Adm'rs if they evict under claim of title they are liable on their cov't

Dyer 257 b. 2 Com. Di. 80.
Esp. Di. 302

A general Covenant of quiet enjoyment by an ex'r or administrator or such extends to them selves and persons claiming under them

ie. the breach must be for by them or by some person claiming under them — Kirby 133

Suppose an Exr or such cases a person entitled and covenants generally for quiet enjoyment then the rule applies. The reason is that he covt only in his ~~private~~ representative authority and is ~~no~~ liable only in ~~that~~.

In Eng when a Plff recovers on a covenant of seizin he recovers the consideration money and interest — When he recovers on a covenant of warranty he recovers the consideration money interest and I suppose also the costs of defending his title — for this however I find no English decision. I infer it because it seems perfectly reasonable

In Conn. the recovery on a covenant of seizin is the same as in Eng. — If the recovery is on a warranty ~~of lo~~ — the value of the land at the time of the eviction ~~together~~ with the costs on the rule of damages Kirby 3

At some rights as to the English rule you will perceive it is different from our own. and the reason of the distinction I apprehend is this — In Eng. the value of the land has long been settled, so that the value at the time of eviction was probably the same as at the time of purchase — the consideration money then and the interest is the ~~true~~ measure of the damage which he has sustained by eviction.

But in Cont and in other new countries the value of lands is continually changing - the value at the time of the eviction then is the only correct measure of damage sustained by it

On a covt of seizin Stoke the rule to be that the assignee of the Grantee cannot on this maintain an action vs the grantor - this covt does not in legal language run with the land And the reason is the Covt is broken at the time it is made - It then became a mere chose in action in the grantee vs the grantor and as such it could not be transferred At any rate this was the decision of our Supreme Court - in 1802 - Tyler vs Epiphany upon a solemn review of all the English authorities -

But the assignee may maintain an action on the covt of warranty if the eviction happen during the Grantees time - for here you may observe the covt is not broken untill the assignee has the title - the injury is directly to him The assignor never had any right of action this rule is not clearly established by authorities But ni pri 158. 9 Esp di 295. 15 Cok 166. 11 m

In any of these cases where an action is brought

to evict the grantee he ought for his own security to notify the Grantor that the writ is brought that he may if he please appear and defend his title - the Grantor is not bound to appear and if he does not the grantee must defend as well as he can -

3 B C 300 - 1 Bor 532 - 1 Inst 101 - 385 a

This a common practice in Con - In Eng it is done only in real actions, because their ejectment is a fictitious action having fictitious parties - This notice is here given by a writ of summons called after the eng with name a writ of vouch ther

I observed that the Covenantee should give notice for his own security - If the Grantor is not vouched he is not concluded by the judgment But if vouched he thus has an opportunity to defend and is concluded by the Judgt whether he appears or not - If then the vouchee brings his action the judgt is conclusive evidence that he was evicted by good and older title - this is the rule of Cont I can find no English rule upon the subject

Quit Claims or more properly speaking releases contain neither of the Cov^ts of which I have been speaking, but it was formerly supposed that the releasor in Cont was liable

on an implied cov[enant] if he used any means of fraud as to the release. But this was never thus settled in Eng and it has been totally overruled the other way by our Supreme Court of Errors.

2 Day 128 the cases in note there

Distinction relating to covenants and other contracts to pay money by instalments.

On a penal bond conditioned for the payment of an aggregate sum by instalments the action of debt will not lie for the non payment of the first instalment when due. But if a penal bond be given conditioned on the non payment of 100 dolls at the end of 6 months and 100 dolls at the end of 12 months debt will lie at C.L. immediately the first instalment is not paid. 1 Mill 80 Young 515 814

C.L. 515 Bell 108

And the whole penalty will be recovered for it is forfeited by the breach of any one condition But if a single bill be given for the payment of any aggregate sum by instalments no action will lie till the last instalment is due. For here you observe there is no penalty for the breach of the condition But it is in the form of a penal bond given for the debt due. The only action which can be brought on this bill is on action of debt

which must always be brought on the entire contract
And as there is no condition broken by the first
~~instalment~~ non payment of the ~~first~~ instal-
ment the action will not lie till all the
instalments are due — there unless in some
of the books very incorrectly expressed —
Coke lays down the rule that if a bond is
given for payment of an aggregate sum by
instalments no action lies till the last is
due — But by bond he means single bill —

1 Saund 207 [illegible] 2 H2 L. 10 Lutw 1186
Bull ni prius 108 1 Blac. Rep 548

But where rent is reserved by instalments the lessor
may bring his action when the first instalment
falls due though no bond be given — this seems to
resemble the case of a single bill but the case
is the reverse — 3 C 22 — 1 b C 128 —

The reason of the difference is that in the case of
a single bill that is one entire debt which cannot
be apportioned — but in case of rent it is considered
as a reservation of part of the profits of that part
which shall become due on the day when the rent
becomes due — These reservations are considered as
distinct debts and due as in the case of a single
bill at the time the contract is made —

As to a contr or note to pay an agreed sum by installments an action covenant broken on the contr or of Assumpsit on the note will lie when the first installment is due and the plff recovers what is due at the time.

On the other hand an action of Debt will not lie untill the whole installments become due.

If debt is brot the rule is the same as in the case of a single bill and for the same reason the action must then be for the whole amount — but in the former case the action is only for damages sustained Brook Ch. 175. 3 Lev. 22 a 2 Lev. 94 b — 8 Co. 153 3d Wood Ins. 165 Salk. 165 Bul. ni. pri. 167-8 Contra Wood Inst. 110

If the contr is made for the payment of money at different times where there is no agreed sum covt broken will lie when the 1st sum is due and I think Debt also will lie. Lord Loughborough says in the case in Hen. Bl. that there has been a difference in a contr to pay 100 dolls at different ~~times~~ installments and a contr to pay 25 dolls at the end of three months and so through a year — In the former case Debt will not certainly lie till the whole is due.

[illegible] Bl. 556 Bull. Ni. Pri. 770

But in the latter I don't know any reason why it will not- In this case there is certainly no aggregate sum- Suppose the latter were on different papers to pay 25 dolls at the end of each quarter debt would then undoubtedly lie on each of those Cov'ts- ~~Thus~~ I see no ~~difference~~ reason for difference when the Cov'ts are all on one piece of paper - I know of no decision in point- but if this is not the distinction upon ~~wh~~ Henry toth I don't know what it is-

Cro Eliz 807- Bulst 158'

If upon the Covenant for the payment of an aggregate sum by instalments- there is a clause that upon the non payment of any one of them the whole shall immediately be due such clause is binding- Here then debt will immediately lie for the whole sum if any one remains unpaid at the time when due But if there is no such clause the only action is Cov't broken- Chitty on bills 212.13-

And I would here observe that in an action of Cov't broken the Plff may assign any number of breaches- for there may be many

and the Pltff in this action can recover only
for what he lays in his declaration —
As if when the cond is to pay an aggregate
sum by instalments he lays a failure to pay
only as it respects the last he can recover only
for that though none of the instalments have
been paid — But on a penal bond at common law
the Pltff can assign only one breach though
there has been any number — and the reason at
common law is that one breach forfeits all the pen-
alty — so that alleging more would at C. L. be
duplicity — the action being debt the whole
must be recovered if any is proved —

2 Wil 134. 135 — 2 Lev 198 3 Salk 105
1 Rolle 112 Comb 247 — 2 Mod 43

In Conn wh a penal bond is given conditioned
to pay an aggregate sum by instalments or to
do any number of acts, the Pltff must for his
own security allege so many breaches as
there are — For by our Stat the obligee never
recovers to the whole amount of the bond
unless that is the amount of the damages
he has suffered — the Stat gives the Court
power to chancer down the bond i.e. they inquire
into the amount of damages sustained and give
damages accordingly Stat Con 35. 36

And now in Eng by Stat of 8&9 of Wm 3d the Pltf may assign as many breaches as he pleases and will recover only to that amount — and so he must for his own security assign all the breaches of the bond —
~ Bur 820 ~ Wils 377 8 TR 226 2 Blk 1111 - do 1016

It would be observed that at law how where several breaches are assigned in an action on a bond advantage may be taken only by special demurrer — the fault is only in form —
Cowb 97 2 Bur 135

Who are bound by Covenants?

1st as a general rule the Ext and Administrator is bound without naming — they are in the language of the law included in himself thus if I covenant to pay a certain sum of money at a certain time and die before that time my Ext or admin't is bound by this covt the usual method however is to name them —
~ Dy 147 ~ Roll 311 —
1 Powell on Cov 128

To this rule there are some exceptions — where the act is to be performed by the testator personally the covenant is the primary and not

transferable - As if I agree to labour for another a year and die before the expiration of that time my Ext or Adm need not perform the labour nor procure another to do it - If the covenant be to pay a sum of money it makes no difference who pays it - Cok Litt 55 b 1 Bac 553

Com di let Covt 1 2 Mod ~~270~~ 269

But even in this case if the Covt is broken during the testators life time then the Ext is liable - For at his death he was liable in damages - It had then become a chose in action and for this the Ext is liable -

Com di Covt -

An ancestor seized in fee may bind his heir by Covt - Thus if a tenant in fee simple covenant to convey to B and dies his heir must convey in pursuance of that covenant -

So if A had been tenant of a term of years his Exts or Adms would have been bound to convey ~ [illegible] 213 [illegible] 338a

There are covenants real or covenants to convey or assure real property - and tis a general rule that they bind the covenantor and descend to the covenantee [illegible] V.B. 32 3d [illegible] 520

[illegible] 168

And the heir of the covenantee may sue

on the covt though not named it the covt runs with the land and it appears that it was designed to continue after the ancestors death - Thus if the lessee covts to keep the fences in repair and the lessor dies his heir may sue for such a breach of the covt
a Lev 92 Skin 305
Esp ai 294
And at Com Law the heir having assetts by descent is bound by his ancestors covenants of seizin or warranty - But he is not liable unless he has assetts and only to that amount
1 Vent 175 3 217
I have been informed by our judges that the heir was held liable in this State on a covt of seizin But I doubt whether upon principle the heir can in this State ever be liable - If the ancestor was not seized the covt was broken ex instanti when made and the ancestor was liable to an action - This was then ~~a chose~~ a debt or chose in action agst the ancestor - Our own Stat provides that the Extor &c shall be liable to pay all outstanding accounts or debts - Upon a covt of warranty when the breach happens during the heirs time or it is expressed he is undoubtedly liable as at Com Law - but now I apprehend when the breach was before his time he would not - for the reason the was a right of action in the ancestor - Stat 264. 275. 276

All Covts respecting Estates ~~are~~ may be divided into two kinds such as run with the land and such as are collateral ~~to or~~ do not run with the land

There are certain very material distinctions as to the liability of the assignee lessee & grantee on their different covts -

As to leases 'tis a General rule that the assignee is liable for all breaches of covt though not named if the covenant runs with the land But if the covt be collateral then the assignee is not liable 1 Saund 345 1 Keble 21 Cro Eliz 457 4 Coke 80
5 Coke 16 b - 24 a & b -

As to what covenants run with the land this I take to be a Gen rule - If the thing covenanted to be done or concerning which some thing is to be done was in esse at the time of the lease and part and parcell of the thing leased the covenants runs with the land - this may be best explained by examples - A leases to B lands and buildings and the lessee covenants to keep the buildings in repair - then the covt according to the definition runs with the land - the assignee would then be bound to repair -
1 Bos & P 152 153 Cro Eliz 83 Moor 357 Bulstr pt 1 69

The true theory upon the subject seems to be this - That when the covt runs with the land the thing to be done is annexed to the thing leased — /

Again the lessee covenants to pay rent and assigns does the covt run with the land - Why yes - for the rent is potentially in esse though not substantially so i.e. the thing which produces the ~~thing~~ rent is actually in esse - For the rent issues out of the land leased
But on the other hand if the thing to be done or concerning which something was to be done was not in esse and was not a part and parcel of the ~~land~~ thing leased - the covt is collateral and does not run with the land
If then the lessee covts to build a wall on the land de novo the assignees is not bound unless named in the covt - In this case the covt is collateral
1 Bac 534 5 Co. 16 3 Burr 1271 1 Salk Dr 552

So a covt is said to run with the land if it goes to the support of the thing demised - In such case then the assignee though not named is bound by the covt - As, wh - the lessee covts to make all necessary repairs or to have so many acres of the land unplowed in these cases the covt goes to the support of the thing demised and so the assignee is bound without naming 5 Co 17 b 2 Ld. Ray 125 4 Dev 253 ... 283

And upon a Lease that runs with the land the assignee is bound whether the assignment of the whole or part of the premises is made — This rule cannot I conceive be universal — What Lease goes to the support of the thing demised that I think is applicable doctrine I think not — Thus if B the lessee assigns 5 acres to C — C is bound by the covenant to repair his part of the demise —

2 Eq Ca Abr 380 Rod Ch 222

When the assignee is named he must perform all the Lease which I have been treating whether they run with the land or not the difference then appears to be this — If the assignee be not named in the Lease he is bound only while the Lease runs with the land as it is only Collateral As the Lessee cannot put him only and assigns to build a mill &c upon the premises the assignee is bound by the Lease though it does not run with the land So assignee by accepting the assignment adopts the Lease as regards the remedy between the assignee and lessor 5 Rod 66 1 Bac Ab 134

This rule however is confined to cases where the covt is to perform something which concerns the thing demised - If the covt be to do something entirely foreign to the thing demised the assignee is not bound even though named - Thus if the lessor covts for himself and assigns to build a house on a different piece of land from that leased the assignee is not bound - He is a stranger to the covt - for merely naming him does not make him a party or privy unless he ratifies the contract

5 Coke 16 b hist. pt. 1 438
1 Saund 352

But not - according to the rules already given the assignee is bound by the covt; he is only so far bound as to be liable for rent which accrues or covt broken after the assignment - If the breach or rent due is before the assignment the lessee and not the assignee must be liable - And as to this and many other points upon this subject the assignee the bound upon the covt is bound only in consideration of his own possession or the privity of estate between himself and the lessor - This principle gives occasion to many distinctions - Suppose the lessee breaks his covt and then assigns - Here upon the principle just stated for there is no privity of estate between the lessee and assignee until the assignment -

The assignee is not ~~liable~~ bound nor liable for the breach — But the lessee is bound by all his cont. on the ground of privity of contract —

1 Freeman 336 · 1 Vent 35 · 6 Ld Ray 311
2 East 575 · Salk 199 · 3 Burr 1271 · Doug 148

Upon the same principle the assignee is not bound by the cov. after he has assigned ie he is not liable for breaches which happen after that time. As where rent becomes due after assignment — he is not bound to pay it — For his liability depends upon the privity of estate and the privity ceasing with the possession is gone by the assignment — Cartew 177 · 1 Vent 356 · Doug 435

And this rule is so strict that if the assignee assigns over even the day before the rent is payable he is not liable for any part of it. In such case the second assignee must pay the whole rent

3 Lck. 22 · 1 Salk 81 · 2 Mod 71 · Doug 461

For rent is in the nature of an entire debt becoming due on the day of payment and cannot be apportioned at the time of the assignment then it is not a fore-thing due — Bu. ni. Pri 182

And still further if the assignee assigns his interest to a beggar the day before rent becomes due with an intent to defraud the lessor of his rent he cannot or can he subjected —

1 Bos and Pul 22 Amb 485 Strong 1221 Atk 72-106
Contra Kent 329-Do 331

The reason of this that the assignee is liable by virtue of the privity of his estate which ceases with the assignment. If however in such cases it be made to appear that the assignment was a mere sham and not intended to pass the beneficial interest the assignee would still be liable. The privity of estate still continues — 1 Bos and Pul 22

But when the assignment to a bankrupt is bona fide they will compell the assignee to pay rent for the time he enjoyed the [illegible] estate. They can apportion the rent and will compell a payment pro rata —
1 Mass 87 88 105 1 Term 135 1 355

If the assignee be evicted of part of the premises only, the rent may be apportioned at law. his privity of estate as to that which remains still continues. Should he possess is entitle the term when the rent is due the rent as to that part becomes due and has accrued — 2 East 575 3 Wils 22 a b
The rule is the same as to the lessee.
This is true where the action is[illegible] in debt

For this action is founded on the privity of estate between the lessor and lessee — But if the action is Cov't broken the rule is different — for this action is founded on the privity of contract —

There has been a question in Eng whether they will issue an injunction to restrain the assignee from assigning to a bankrupt — there has been no decision — I don't see how an injunction can be granted — they may give a remedy if he does thus assign — But the estate being in its nature assignable I don't see how they can compel a person to retain it

1 Tont 351 2 Atk 14 548

It was formerly doubted whether a Covenant by the lessee not to assign would bind him But it is now settled the other way —

Cro Eliz 8 Co 8 Str 1300 3 Sp ii 276

But such a Cov't is not broken by the estate being taken by the lessee's creditor — this is not his act — the estate is transferred by the operation of law and supposed to be so without the lessee's assent 8 TR 57 2 Ly 2 All 00 Dy 56 —

Nor is such a Cov't broken by an underlease of part of the term — thus if a lessee for 20 ys underleases to for 10 ys this is no breach of the Cov't not to assign — this is not

an assignment— for an assignment transfers the whole interest— Nor is such a cov^t broken by the lessees devising the term for it must go into other hands at his death— As if A the lessee dies at the end of 10 years it is no breach to devise the estate for the remaining 10 years, as it the intention of the parties that the lessee and his representatives shall enjoy the estate for 20 years

& H 5 4— 2 B C— 2 [illegible] 1234

The Lessees Liability— It is a gen^l rule that he is always liable on his express covts as well for breaches before as after assignment— He is a party to the cov^t & liable on the ground of privity of contract—

A lessee for 20 years having cov^d to pay rent so long must pay even after assignment

3 [illegible] 226—230 [illegible] 98 100 [illegible] 424
[illegible] 199 1 [illegible] 439

If the lessor has accepted the assignee for his tenant by accepting rent from him he cannot afterwards maintain Debt against the lessee for rent due— The reason is that the action of debt depends upon the privity of estate whereas cov^t broken depends upon the privity of contract— eg. A leases to B for 20 years B at the end of 10 years assigns to C and A accepts rent of C— the [illegible] privity

of estate between A & B is gone by mutual consent of the parties and debt will not lie for cont. rent on the express But even in that case the lessor may maintain an action on the express cov to pay rent if there are any for the privity of contract still remains.

Coke Lit 304-322 1 Saund. 237 Bac. Ab. pr. 159

1 Black 233-44

4 Coke Rep 334 1 Hay Bl 444 1 Term 354

3 Coke 236 1 Bl. 439

But if on such case the cov is implied in law the lessor can maintain no action vs the lessee. The reason is that the privity of estate is gone. The lessee has parted with his interest with the consent of the lessor - Well then the privity of estate being gone and there being no express covt there can be no action - For implied covt always arise from and depend upon ~~same~~ the privity estate -

Coke Lit 522 1 Hay Bl 439 note

1 Sid 447 1 Saund 241 b

When the covt is express the lessee is not discharged after he has assigned and the lessor has accepted rent from the assignee and whether binding when the covt is express and whether binding on the assignee the lessor may maintain an action agst them both at the same time on the same covt - As if the lessor covts for himself and assigns for 20 years

to pay rent for that time and action lies at the same time against both.

But the lessor can obtain but one satisfaction unless it be for costs i.e. if the lessor recover of the lessee or assignee he can recover nothing but costs of the other

And in such a case if the one from whom he has not recovered tenders to him his costs and the lessor still pursues his action the Def may be relieved by an 'audita Querela' Cuk Jo 253

By the 32 of Henry 8th the Grantee of the lessor has the same remedy on the covenants running with the land as the lessor himself has at com law — If then the lessor assigns to J.S. Stiles stands in his place as to a recovery upon the Covts 1 Inst 1 2 M' Cuk Rep 522

And by the same Stat the lessee has the same remedy against the lessor's grantee as he before had against the lessor

Blck 22 — 4 Bac 271

There is a marked difference in law the assignee and the derivative lessee or under tenant — A derivative lessee or under tenant is one who ~~under~~ takes from the lessee a ~~part~~ conveyance of part of the term.

or who takes the whole residue of the term as tenant to the lessee — An assignee is one who takes the residue of the term as tenant to the lessor

This distinction is very important for the undertenant is never liable for the rents to the lessor — He is a stranger to the contract
1 Saund 241 & Doug 177. 2.180

So if the lessee mortgages the whole term the the mortgagee is not liable to the lessor unless he takes possession — there is no privity between him and the lessor — For if he takes the mortgage merely as security — ~~he is regarded~~ he is regarded merely as an incumbrancer and not a purchaser Doug Lunt 38.

This then is the principle difference that an assignment is a sale of all the lessees interests, an underlease is the creation of a tenancy under him — The assignee is tenant to the lessor — the under tenant to the lessee —

A part of this title was copied from Mills notes

Monson on cov^ts [illegible]

Assignees are liable upon their cov^ts whether the assignment ~~whether the assignment~~ is ~~to~~ actual or by Devise or sale &c — that is whether the assignor himself makes it or the assignee takes by Devise —

A has a term and dies and devises it to B now B is liable Doug 477

Not settled whether an assignee of part of the premises is liable for rent or any part of it — the lessee may be sued for the whole or part but C may the assignee?

A has a lease for 10 ~~years~~ lives he assigns 5 lives — can the assignee ~~for~~ of 5 lives be sued? Cch Rep 156 Leo^d Ch 633

Gould says there is much difficulty in apportioning the rent — Quaere how this may —

If a Lessee cov^ts that he and his assigns shall be liable for rent so long as they remain in possession and the assignees remain in longer than the term — still they are liable.

[illegible]

Duties and rights of the representatives of the Covenantors and ees

An heir may be bound by a covenant even if he has assets -

In an action on such a Covt. [against] the heir infancy is no [illegible] - the parol may demur that is put off pleading untill he arrives at 21 - yet infancy is no defence when the obligation is derivative - the same of an infant

Inst 2 th 77

If a covenant with the and his heirs for quiet enjoyment, and the Covt is broken in the time of the [illegible] the action must be with the [illegible] and not with the heir [illegible] for the damages arrived [illegible] for [illegible] belong to his personal fund -

1 Ven 171 Bul 71 [illegible] 60
2 Lev 25 [illegible] 158 [illegible]

But [illegible] - if the Covt is broken after the Covenantors death, the [illegible] is [illegible] and not the Exit. [illegible] the covenant is broken to the injury of the heir

Bur 1 P 197 [illegible] 141
2 Lev 92

If the Covenantor Exit. though not named is liable and not the heir for the personal fund was held [illegible]

It will lie by the Grant also if broken after the death of Covenantor if the Heir is expressed - for then there is a privity of contract -

so in the case [illegible] - that the heir or that may be recovered [illegible] in Grant is liable to all Covenants expressed

Rolle 519 Dyer 271
Noble [illegible] 3 [illegible]
1 Powell 128

Exception where the Grant is [illegible] non performance after his death does not subject the [illegible]

[illegible] Noble [illegible] 545

[illegible] heir is not expressed [illegible] in [illegible] the [illegible] is not liable for nonperformance after the testators death - this rule applies to the Covenantor with or seal the heir only in such case is liable for the [illegible] is liable only for expressed Covenants and [illegible] all others he is a [illegible]

Dyer 257 [illegible]
2 Lemon [illegible] 3 [illegible] 133

When an [illegible] comes into possession of the testators goods he is then may be sued as [illegible] upon the Covenant [illegible] for the [illegible] an assignee [illegible]
[illegible] 309 [illegible] 245

The heir of Covenantor is liable for breaches ac-
cruing before or after death of the Covenantor
if he has assetts & ... descend. This
means if the heir is named. This not
is necessary — for if the heir has assetts
and is not named he is still liable

7 Term 557 1 Wils 1505
370. 373 584
2 Show 378 Gilb... 27

In Cov the action must be brought by
the heir whether the breach happens before
or after the death of the Covenantor —
Indeed the heir is not liable for any
breach during the life time of the tes-
tator a Covenantor —
But if he has assetts —

Oct 11 1812

In some cases the Covenantee after assign-
ment may release in others he has not
Gen rule at com law — that the obligee
may release after assignment pro-
vided the instrument is not negotia-
ble

Bills of exchange

In analogy to this — if the lessor after
assignment releases to the lessee
still the assignment —

32 Hen 8

Covenants and bonds to save harmless

A Covenant to save harmless is to indemnify or secure him from any loss at the loss—

Thus when one becomes surety for debtor a bond is frequently given to save him harmless—

Contracts of this nature are not broken by the tortious act of another—

Suppose upon receiving an assignment ~~of~~ of a lease the assignee gives a bond to secure the rent now at the ~~lease as~~

1 Strange 160 Coke Litt 2 Mod 135
2 Lev 137

When a [illegible] admits a prisoner with the liberty of yard—such a covenant is usually taken— Now if the prisoner escapes the [illegible] may maintain an action [illegible] on this bond even though the creditor has not sued the [illegible] for the bond ensures as the liability.

Coke Litt 53 123
1 Rev 1 510—511

If a surety ~~becomes~~ takes a bond for security and the creditor sues him, [illegible] the surety may bring an action [illegible]

the bonds man ~~who~~ who is liable immediately for the liability is a sufficient consideration to support the action — the meaning of the parties ~~was~~ is that the bondsman shall secure harmless

3 Bulst 234' Selk 106
5 Co L 24' A ~~E~~ FL 100 "6" 11
3 ~~E~~ B 307 2 do 7 ~~B~~ 115 do 307
7 E L 97'

Last decision in ~~one~~ our courts is in support of this rule

1 Tent 507 2 Swift 150
Kirby 8 141

But suppose the money is collected out of the Debtor by the Surety and then the Creditor comes upon the Debtor also

The rule is the Debtor may have relief in Eq by compelling the surety to refund to the Debtor what has been thus recovered — 2 FL 1021 5'

The Words not Indebitatus Assumpsit &c. on action at law will not lie to recover back a former judgment

a Baerlock marsh
~~then~~ then lately by 7 E L 269

If a surety takes a covenant to sav. harmless after his liability has arisen he cannot maintain an action untill some other damnification has occurred - a recovery by the Creditor &c - The Damnification here meant by the parties is clearly not such as existed at the time - For upon this supposition an action might lie as soon as the bond was given which was intended not as a present but future damnification -

Salk 196. 2 Bulst 234.
1 Vent 307.

If a surety takes no bond or indemnity and is sued & compelled he may maintain an action of Indebitatus Assumpsit - formerly case.

But he cannot recover in this action upon mere liability, for he recovers only for so much expended -

Why is this difference - because the right of the action is founded upon the payment of the money. Cowp 525. 2 Bl 1045.
1 Str 599. 3 Wils 13. 2 Term 180.
2 Ld Ray 139.

If the surety has taken a covenant or bond to save harmless and after this has

been sued he cannot have this action for
he has taken or accepted of a higher remedy
~~security~~ for the Land. C. L. 100

A leasee to the rent is due

2 Lev 20 [illegible] 5 03 & Sand 3 d 5

But when the lease has been assigned by the lessee he may by a release of Covenants to deprive the lessor of his right to recover for a breach if the release is bro't

A lease s to the agreeing to make repairs —

Cro Eli 361 5 03 a
2 Roll 411 Cro Ja 308

The reason of this difference is that the former comes within the 32 of Henry 8 — and at common law this latter is not negotiable —

But Gould says that the latter runs with the land and of course it may be assigned at law — no satisfactory reason says Gould.

And as to release — general rule

A release by the covenantee of all demands does not release the covenant or discharge the rent as the case may — for in the case of rent this does not accrue before the end of the year —

So if before covenant broken all right of action is released — this does not release

[illegible] 171 [illegible] 322 [illegible] 11 [illegible] 55 [illegible]

Pleadings in the action of Cov^t broken—

I now tell the rules of pleading in Cov^t which are common to all apply only those applicable to this subject are noticed—

The declaration must always state the covenant was by deed— for a Cov^t is written and sealed 1 Chitty Pl 114 Com Dig Cov^t 17 Coke Lit 35 b 209

But if an agreement is in the form of a Cov^t but not sealed an action on the case lies but not an action of Cov^t— A promissory note is an instance—

The principal rules relating to the declaration respect the mode of laying the breach—

Gen rule that where the breach is Gen^l or general assignment of the breach may be made and is sufficient Thus if in a Cov^t of seizin an allegation that Deft was not well seized this is good— But if on the other hand the Covenant was specific and breach is so an assignment must be specific.

Salk 139 Ld Raym 478 Holt 176 Carth 298

And the most gen assignment of the breach is in the ~~assignment~~ words of the cov't that is negativing the words
4 Coke 80 Cro Jac 369

And the breach must be so assigned as to appear to be within the face of the cov't 'tis not sufficient that it can be proved — Thus whr — a tenant covenanted not to cut down timber trees only for repairs a averment that he cut down 100 & other is not sufficient assigning of the breach
Phil. 5 Cro Eliz 348
Doug 208 Esp N.P. 299

And if the pltf narrows the breach by not inserting ~~[illegible]~~ allegation he must confine the words to the subsequent breach —
Thus whr a tenant agreed to use the ~~[illegible]~~ land in a husband like manner & then the lessor says he has broken the covenant

3 T R 307
When the deed contains a covenant against the certain a certain event the pltf need not take any notice of details [illegible] performance

The Deft must take advantage of the defea-
zance in his defence
But if there is an exception in a cont
he must negate the exception and show
his case does not come within the
exception
Thus if a tenant covenants to repair all
the fences but one - now an allegation
that he covenanted to repair all the
fences is bad for this works a variance
But in the case of proviso the cont is com-
plete without the proviso and being
not necessary to mention the
proviso or defeazance -
If the Pltff alleges that he has not
repaired two rods of fence this is not
sufficient he should have gone further
and stated that this
~~Ld~~ Hobart 65 Esp. ni 300
If the Pltff assigns a ~~particular breach~~
on inconsistent breach and a ~~vi~~ distinct
after verdict this surplusage is set
aside -
Thus is he avers that on the 12 day of Oct
he broke his cont

Thomas 232

When the covenant is in the alternative the breach must be assigned as to both – thus I covenant to pay 6 months hence 100 dolls or convey a piece of land – It must be assigned that neither of these things are performed for the covenantor might do which he chose and in saying that one is not performed is never sufficient

1 Leon 250 1 Eq Ab 300

But there is a distinction between a covenant in the alternative and one when the phraseology is alternative but ~~not~~ in legal effect is not alternative

Thus if one covenants to pay a sum to be paid – now there is not legally in the alternative though such is so –

1 Thomas 229

When the covenant is to be performed on the happening of any one of two contingencies one or other which shall first happen tis not necessary to allege that this was the first contingency 2 H Bay 159

Where if A Contract for 100 dollars to be paid upon the death of B on marriage of C which shall first happen

Where the Cost is for an act to be done by the Covenantor or his assigns the action must be brought but such must be laid in the assignee if brought by the assignee

But the rule does not hold where action is brought on the Covenantor himself for if there was an assignment then the Covenantor must shew that there has been an assignment — It is presumed there has been no assignment

Storey 228 Pothier 139

But on a Cost to do an act by a man or his assigns or a covenant that the act was not done the Covenantor is entitled for if there is an assignment the Covenantor must shew it — but if the action is brought by the assignee the non performance he must shew that the act was not done by the Covenantor or himself — Pothier 139 Cited 140 5 Ves 133

Actions of Covt. — Pleadings — laying the breach

Ld Holt has laid down the rule in a perplexing manner

Where there is a covt for a sum certain there can be no apportionment of the demand the breach must follow the entire covenant you cannot declare upon a part

Thus where one covenants to pay 10 pounds per ~~10~~ ton — the breach laid was for not carrying 1 ton and one hogshead — this ~~writ~~ was ill assigned for the covenantor never promised to pay for the transportation of the hogshead only so much per ton ~~portion~~

But if it was 10£ per ton or a common rotum then he might have recovered for the hogshead but not without —

2 Lev 124 Allen 14

But in the first case if the plff would enter a remittitur as to the hogshead he may proceed and have judgment

Salk 658 1 Mod 165

But if he does not enter a remittitur it is bad upon demurrer or if judgt is entered it is bad on a writ of Error

Pleading on the part of the Deft.

In Cov.- a plea that the Deft has not broken his covenant was held sufficient till lately - but now 'tis otherwise.

Espinasse says this cannot be done for it throws questions of law & fact to the jury and does not close on issue -

The facts must be shown - in otherwise the Plff may give in evidence to jury matters of fact & and matters of law.

Hence 'tis very improper -

In many cases this does not make an issue -

Thus where a ~~[illegible]~~ is sued on his Covenant of seizin that he was well seized if he pleads that he has not broken his Covenant - now the issue he ought to be he was ~~seized~~ well seized - 2 Bent[illegible] [illegible]

& [illegible] 278 '2 Mod 33 [illegible]

Cov^t broken by Sones Gouta–
Generally laid down that where the deed or all ~~deed~~ the lease in a deed in affirmative the Def^t may plead performance generally without specifying any particular act
1 Saund 303^d & Cope on 305

But this rule is of universal application is not law forth or some exceptions–
1. Insuff fact this rule relates only to cases in which the things covenanted to be done are multifarious then it is in exception to a general rule, right ~~the~~ reverse–
Thus if a Dep^t who is sued for not returning writs for many years past he may plead a return or performance generally for the purpose of avoiding prolixity – again when an officer enters into a cov^t to discharge his duties ~~most found~~ to enforce the particularity if he should set forth all his individual ~~detailed~~ acts – then in the first case the Dep^t ~~may~~ plead that he had returned all writs would be good – but if he plead that he had performed all his duties would not be good for this would be pleading matter of law

Comp 575 2 Ba. 91 Thom. pro on a 9 Co. Lit 303d

The General rule is that where the Def has covd to perform several specific acts (after maturity) and is sued for a breach of the covt he must plead performance specifically — he cannot plead that he has done all &c —

Thus if an Ext covts to pay all legacies in a will he must plead as to each particular legacy that he has paid it — or again where a person covts with his attorney to convey all his lands in fee simple now if he is sued he must say he conveyed black acre and white acre and that he was seized of in fee —

Cro. Eliz. 7 & 19 Cro. Ch. 359. 360
Co 303 Sell 1 & 91 1 Sh 953d

And a plea of performance otherwise than in the words of a covt is not good — yet Gould thinks that if pleaded in the spirit of it it would be good =

(Bos and Pull 455)

That performance of affirmative Covts may be pleaded Generally as to avoid prolixity you may see Comp. 575^d 1 Ch. 753^d Lord Eliz 749 — 916 — 1 Bos. on Pulle 613^r

Another some mode of Genl pleading is allowed of in Replication assigning breaches of bonds & where assigning particular breaches would tend to prolixity Thus where a man Covts not to sell a particular kind of merchandise and being sued the Replication state generally

8 T. R. 459 2 Will 11 Bl. Rep. 535
1 Sh 2182^d 1 Bos and Pul 640
2 Burr 772^d

But when some of the Covts in a deed are negative he cannot plead performance generally but he must plead specially both negatively that is that he has not done so &c. —
For when he pleads performance specially in this mode a presupposes a positive act but pleading Generally is only form and is cured by special Demurrer

Cook Eliz 23^d 2 Wil Saund 1 808
Comp. 575 4 Bac abridg 809

Exception - note the negative covenants are void and the affirmative covt good he may treat the negative covts as a nullity for being a void they are a lys of nullity

Thus to a Deputy Shff it among other things covts not to serve particular process & on it he is sued by the Shff he need not notice this covt of negative for tis void

Hob. 13 — Moore 858

1 Saund 117

When the covts are in the disjunctive the Defdt must show which he has performed

And he need plead only performance of one

1 Snell 363 — 6 Ch? 138

Cro. Eliz. 385

Doubted whether plead ? in the manner of prohibition in this rule is not the matter of form or substance Gould thinks ? matter of form

Cro. Eliz. 286 — 7 Lev 311 — 2 Bac ? 11

5 Com Dig 82 — 21

Whenever one covt to do what is matter of law he must not only plead performance strictly but he must plead — in modo — he must show in what manner he did — thus to make a deed or suffer a fine and common recovery —

6 Thus if the Cont is to execute a bargain and sale the legal mode of doing it must also be shown else it does not appear that he has not done what he cont to do — for the court must judge of the mode — 1 Lev 57 2 Co 67. 107 2 Lev 229 9 Coke 25 2 Bac 1 2d Lev 350

And indeed the rule is universal that where the Cont is to do an act which must appear from record the mode must be shown Thus the levying a fine — the mode must appear because this is matter of law and the Ct must judge of the mode 7 Mod 303 2 Lev 350

The most difficulty arises on the Defs side arising from Conts of indemnity — much difficulty in this distinction

In Conts in bonds of indemnity the Deft may sometimes plead the Pltff is not damnified and in some case he must plead that he has discharged & freed the Pltff from all ~~[illegible]~~ damages and the manner in which he has done —

If the Cont is to free the the Pltff from any ~~liability~~ particular thing ascertained

in the instrument the non damnificatus is not good plea —

2 Co. L. 21 A. Carthew 374
1 Sound 117 note Cok Eu 133, 914
1 Bos and Pull 634 note

The covenantor in this case the ~~covenantor~~ must plead that he has performed and discharged the covenant

Contra if the covenant is indemnify or save to the covenantee harmless non damnificatus is a good plea

Cok Eu 353 634 2 Wils 125 ~~Saund~~ 117
1 H 307 10

The difference is founded in this — in the former case he is to do something specific which is to discharge the covenantee, but in the latter case the covenantee may save harmless without any act done for he is saved harmless if he has not been damnified

If the condition of a bond using the words discharge or acquitted the non damnificatus is good plea because here the damage is not ascertained but is to arise sometime in future —

Cok Eu 916 Carthew 374
1 Bos and Pull 634 5 Mod 24

But further if in the case of the discharge and so forth the discharge is to be made by doing a particular act &c or by procuring a thing he must plead payment and not non damnificatus - for such is the case as in to pay the bond - 2 Bl. A. 1 Saund 117 note

1 Bos and Puller 638'

And for the same reason if a bond is given for the payment of money at a certain day "non damnificatus" is not a good plea though it appear that it is a bond of indemnity on the face of it - because the

1 Bos & Pul 638'

Once more - when the is about to save harmless non damnificatus is a good plea but if the Deft will plead affirmatively he must plead ~~such as~~ quo modo -

So in the case of discharge or quit from some further damages non damnificatus is good but if he will plead affirmatively he must do it specially or quo modo - on the same gen rule - in those cases in which non damnificatus is good plea if the Deft will

plead the affirmatively he must plead specially or not your modo - because this presup-poses a positive act - which ought to be shewn

2 Com 36 Lutwyche 363
Com 34 Lutw 915

If a case is for an act to be done by a stranger he must [state?] performance specially as he would be compelled to do if he was to do it himself

Lutw Saund 559 560. 1 Show 1
Rolle Ab 305

If the Deft pleads non damnificatus — where he has a right so to do — a replication that he has been damnified is bad — for the breach does not appear — he must shew how he has been damnified — such a plea makes no issue to the jury — such a plea does never give the jury any fact to try — If he has been damnified it was by something specific and this must be shewn

1 Saund 231 Lutw 244

A Cov'nt in one deed cannot be pleaded in bar of a covt in another deed unless it operates as a defeasance

But contra a defeasance in a separate deed may be pleaded in bar and so may be a release yet it must appear that the second deed was meant as a release or defeasance and contain proper words -

Thus if a second deed recites the first and defeats it. or if the second deed contains a Covt never to sue the same

3 Salk 298 2 Vent 217 Salk 573 575
Carth 63 Bos 623 Hob 2 Lev 426

Thus suppose contra the lessee covts to pay a certain rent - and in another deed the lessor covts that some part shall ~~return~~ be retained for repairs - this is no bar - though he may be liable on his covenant - he does not say he will never sue or will release - if he had it would have been in the nature of a defeasance

But one Covt may be pleaded to another in the same deed without words of defeasance or release because the instrument being entire the sense must be taken from the whole taken together. Then if the Covts had both been in one deed it would have been sufficient 6 Mod 237 8 Mod 483

Rev 157 – Rop dr 306

Distinct Class of Covt – viz joint and joint and Several

If the Covenant joint and several the Covenantee may maintain an action agnst each of them or against them both ~~[illegible]~~ or each of them may be sued in a separate action – but they cannot sue (at 3 of them) by two of them merely and the reason the Contract must be treated as joint or several – Cyll 10 1 Saund 238 5th Ed 182 n
3 Bac 648

Contra if the Covt is joint – all must be sued it must be treated as strictly joint – this suppo ses all are alive

Bent
– Term 99 Selw 395 d

When two or more joint Covenantees all must join in the action as Pltffs otherwise the Covenantor may be charged ~~jointly~~ doubly – The right of which is violated – if the action is brought by one the deft may oyer the Covt. and on oyer demur

5 Co 18 b – Hob 282 & Story 1840

~~Mount~~ ~~two~~ the right in the covenantees is joint and one dies the right survives to the survivor — the ultimate ~~or~~ right of pass ity does not survive only the right to sue for the property Ent Eli 229 1 Bos in Pul 45 1 Rost 447

In some case where on cont with two or more jointly and several the right is construed to be ~~joint~~ and in other cases it is construed to be several In some case all must join in other or may ... alone, the rule is this — If upon the of ... tion of the lost, the interest of the covenantees appears to be several each may sue seve rally, but if on the other hand the interest of ... be joint then all must join not- withstanding the cont is joint and several E.g. if it or devises ... are ... by the som ~~one~~ lost devises ... over to ... and ... that ... shall hold the lands so conveyed shall be held quietly — this is a ... lost for the interest is several —

5 Col. R. 17.. 7-8' Yelb 177'
Bost ni pu 137-8
Vend 153 2 ... 110 ... and ...

So if one covt to pay A and B 100£ to be divided between them—now this is a several interest and each may have an action

Cro. Eliz. 789. 1 Shep. 865

And each in this case may declare upon the covt as being made to himself without naming the other for this is declared as to the legal effect — same authorities —

Contra if the interest of the covenantees is joint they must join notwithstanding the covt is joint and several

Thus if A leases to A B & C black acre and covts with them jointly and severally to hold — the interest is joint

1 Scott 497. 1 Bac 532. 5 Co. 18, 19. Jenkins 252

It follows there is an inference though two or more obligors may bind themselves jointly and severally yet two or more covt-ees cannot have distinct rights to sue upon these covts — 5 Co 19. Else this would be that the Deft would be subjected to many suits

If two covt jointly and severally each may be sued for the non performance of the other though the party sued is not guilty — Strange 555

When two or more are jointly and severally bound & payt by one is no bar to an action ags. the other but a recovery of satisfaction is a bar

5 Co. 86   6 Cr. & O Cert Jon 73. 4 B Eve 1055

If one of two joint obligors die his Ext is not liable on the Cont — but if one of two joint and several obligors dies — the obligees may bring an action vs the survivor and then on vs. the Ext of the deceased — because th the is th a several duty to pay   1 East 400

If two persons cont "jointly or severally" the or is construed to be an and — which makes it "joint and several" for this is the effect of the Cont — each covts for himself and for the other also — Cro. J. 832 & Hudson bull. 1856

Stuns 76

If, ~~more~~ two covts joint and severally and one of the obligors is made Ext by the Covenantee then this is at law a discharge of both —

Salk 300 & Co. 136 1 Bur 1264

because one of the ~~Covts~~ Covenantees would be Pltff. — And the rule is the same in Chancery as between the original Covenantors and the representatives of the

Though in favour of Creditors if the is not

sufficient assets Equity will compell the payment –

1 Mod. case 240 2 Peere W 241 2 Bac 311
9 Mod 82 11 do 315

For this makes the covenantee a legatee and this is ~~liability~~ subject to the Claims of the Creditors Mearly – But in this Court

Wh the Instrument begins with the words we promise or covt and is Executed as sole this is a sole covt – 1 Burr 323 2 Ch 32

Two or more make a covenant in a bond this is joint of course unless words are inserted which imply a severalty – 2 Roy 1108 3 Bac 597
1 Henry Bl 236

But if a covt begins with the words (I covt & bind) it is executed by two this is several and joint – I is taken distributively I each, promise not both –
Strange 76 – 809 Probate 130
Chitty on bills 175 2d Ray 1212

Action of Debt by Judge Reeve-Lecture

This action may be brought upon any express contract where the sum is certain.
It may be brought on every express contract - As if A agree to build a house this will not support Debt -
Debt may be brought where the sum is not expressed - though the certain - as if they both and do not mention the sum in action of debt lies for so much as work - Then must be a contract -
suppose a man in paying up a bond 20£ too much - now will debt lie to recover the sum is certain - yet there is no contract - And hitherto assumpsit will lie - but debt will not always lie where assumpsit will - Indebitatus assumpsit will lie where a man sheet upon - then must be a privity of contract to support this action -
That is certain which can be made certain by a reference to some known standard -
Id certum est quod

But when there is no express contract or when a physician attends upon a patient the debt lies and so does indebitatus assumpsit -

Esp. dic. 278 B 13th Geo. 3 6
4th Comyn Dig. 55 c 4 Cob. 94 3 B 0 155
343a

The rule is laid down that the whole debt must be recovered or none of it for you must sue upon the contract or nothing. The action may be assumpsit of debt has been extended to cases of quantum valebat and quantum meruit --

As a general rule ... the whole sum must be demanded

Dy. 220 & Roll 405
& Saund. Bld. 221 Geo. 6
703 note 1 Comyn Dig. 249
369

This action must be founded on the contract entered into between the parties with reference to the thing itself thus when a person promises to throw the ... - assumpsit ...
2 Burr. 1880 Cowper 107 1 Will. 193

One case where debt lies where there is no contract When the action to recover the a penalty upon the Stat. - the sum is certain - the plea is not guilty and not nil debet though it is ...
2 Bos. 148 1 Roll. 598 1 Ld. 102
Cowper 350

Action of Debt does not lie to recover damages yet when the damages are reduced to a certainty this action will lie - the great thing is the certainty

1 Rolle 600

For upon the same principle you can bring an action of debt upon an award - or action on the bond to abide it may Strong 923ᵈ be brought

An action may be brought on a judgt when the damages are ascertained. But while you have the body this action will not lie - for the body is sufficient security. But if you let the debtor escape yourself voluntarily you cannot have this action - the reason is that it is considered that the Pltf was satisfied - He is a release to let him go and this is a release and therefore a discharge

But this says Lucy p Keenus is not a release as the a release executed - the name is the same viz release - the release only of his body.

This rule does not operate upon the insurrection.

Taking execution is not a discharge it is only a bar to any other proceedings. Bac 2482 1 Ld R 587 6 Ld R 35 Str 20 & Ld R 120 -

After a year and day in law you cannot bring on execution - you must of course have an action of debt

It must has been questioned in many of the states whether you can bring an action of debt where the time is limited to take out execution before such time has expired. It has been decided in Hartford that an action of Debt will lie in this case—

2 Bos 100 Carth 30 Wils 351 Croke Jac 304 6 Mod 288 1 Ld 637
2 Bos 141

Been questioned whether an erroneous judgt will support this action — it would not if you could attack the judgt and show it was erroneous— this can be done only by a writ of error— 2 Bos 290 7 Ld 453 3 Wils 346 5 Co 147

Great question } founded on the Constitution of the U.S. the words of the Constitution are the judgment in one state shall be good in another. Now shall this judgt in another state be treated as a foreign judgt or as our own— As to foreign judgt they need not be proved if you can prove there was no foundation for that judgt. Judge Reeve thinks that these judgts must be treated as though it was one of your own state— for this was the intention of the Constitution of judge Reeve— the states have decided this point differently—

1 Day 1 Hen Blk 1 33 2 Henry Blk 23 Day 175 2 Strange 1090 2 Henry Blk 410 2 Hen 232

Action of Debt.

2 One case when the judgt is erroneous through the (other) jurisdiction and not - debt may be brought - that is when the judgt is obtained by fraud - fraud destroys every thing - in short fraud will blot out every thing -

Salk 3 & 12. 2 Wil 247. 3 Wil 341
Dowe 509

Money secured by bond ~~action~~ debt is the only action
b. 2 Bac 136

If the bond is conditioned for a performance of a collateral act the action will lie for the money and an action of application for specific performance in Chy - in some cases another action lies in this case without going into Chy - when the bond swallows up the debt then the higher security should be taken and debt lies -

But where a man has entered into a bond to abide an award - then an action of debt will lie or an action of assumpsit on the award -

The principle is thus if the bond makes a new debt which was never created before - then you must sue on the bond ~~in debt~~ but if it is a security you must sue in debt -

Upon a bond without any time of payment it is due immediately that is next day for the law will not permit a man to sue on the same day for this would be futile -

Now where there is a penalty on a bond - two

action will lie on action of debt on the penalty or on action of Covenant broken but he cannot have both—

It is not in every case in that you can recover a penalty sue upon the cont but must take the penalty—

Penalty may be annexed with different objects— and this makes the difference—

When the penalty is given as an alternative so that the covenantor may elect— he— you may sue upon the penalty or cont—

But when it is to secure the performance of some act you can sue upon the penalty or cont— 7 Ter 124. 1 Mary 1089 1 Rolls 594

Suppose a man enters into a bond that he will account— Now this does not create a debt— account or action on the bond lie— 1 Pick 587

Suppose it is a bond with the penalty to account— now a man until the condition broken the penalty must be recovered— But Chy will chancell down this penalty—

In Eng there is a Statute which (action) enables a court of law to chancell down— this stat has obtained in every state in the union—

The first state of new mod in Massachusetts—

But if the condition is to perform a collateral

it you must still go to a court of Chy. Then so chancell[illegible] bonds —

An action of Debt lies against a sum certain on officer who has collected and refused to deliver it up — But you must go and demand the money for the officer has no pay for travell to pay it [illegible] — but in some cases the Stat[ute] that has given a milage and then it lies without demand — 2 Bos 14 Blob 266 Mon 385

But in other cases for misfeasance of the officer you cannot bring this action as the he attaches his goods for then the sum is not certain —

Cro. Eliz 214 — If the [illegible] shall say that he took the goods [illegible] of his smith action would lie but Judge [illegible] doubts this very much.

In action of Debt upon a penal law [illegible] give an action to any body or informer — but supp. upon the informer or no other person is named the person who is injured —

1 [illegible] 598

But no particular person is injured by it eg. setting a stoddle upon a highway — the public officer must bring the action — that is that the person who is to bring the action is not named nor no one is injured by it —

Setting off -

Chancery inflicts a penalty often now what shall
be done with the penalty of the court of Chancery -
Much difficulty - must you not set for this in law
or Equity - Judge Reeve says the sum is certain one
courts of law may compel the [illegible] -
Been differently decided in the courts of the U.S.
Still the common practice to bring to gether -

Suppose John Stiles [illegible] against [illegible] on
the Pltff to [illegible] and then left the [illegible] debtor [illegible]
[illegible] the action of debt [illegible] in this case to recover
the debt from the Pltff - you may bring the action ag
[illegible] [illegible] - or you may bring an action of [illegible]
[illegible] of a bail bond - on action of [illegible] may be set.

Setting off Book debt. This is similar to an action
[illegible] for a quantum meruit -
You may set [illegible] [illegible] [illegible] [illegible] [illegible]
of the ~~debt~~ thing - [illegible] [illegible] [illegible]
[illegible] money without interest -
It differs in this respect from Assumpsit [illegible]
a [illegible] may [illegible] oath that the [illegible] [illegible] - both
[illegible] may [illegible] ~~this~~ all interested persons may
[illegible] - but this is only to the delivery of the article [illegible]
set [illegible] - It differs in this that the Deft
may recover as well as the Pltff - if the Deft has a balance
[illegible] [illegible] [illegible]
[illegible] -

3 Oct 23rd 1812 Cr. Debt by Judge Reeves

This action lies for rent - the former rule was that if the lease was for a freehold no action of debt lay so long as the lessee's estate continued - but this has been altered by George 2 and Anne - but the remedy lies for rent on leases - the reason was that the rent was considered as an inseparable hereditament - growing rent is real property and goes to the heir -

21 C. 4 9 Cok Lit 92 1 Bolle 595

32 Henry 8 gave to the exec the right to recover if the rent was [illegible] debt accrued - but they did not give as yet any right to the lessor to sue in debt for rent - this was extended to the lessor by Anne - then how is this in the US.

Henry 8 was binding upon us but not Anne then can a lessor in this country recover in this action - for the stat of Anne has not been adopted here -

At common law no action of debt lay to recover this rent - Judge Reeves thinks as the action of assizes is not in use here so that he thinks debt will lie from necessary - Debt always lay for leases at will and for years - Here rent being considered as real property and debt [illegible] a personal action this action before Stat permitted it could not be brought -

Upon rule no person is entitled to this action but he who was named with contract— this does not mean that the person named if any is included this extends to the Persons Exr and Administrators— Agent means his representatives with his Intestate or heirs—

A entered as Clerk to B— C was bound for his good behaviour that is to account for all the money that should come into his hands— now B died— his Exr may bring suit, the case was the Exrs continued the business and after this continuance the embezzled the money now could the Exr support the action of debt— Now the bond was only for security to B and not to the Exrs and therefore this action lies not

1 H 287

A was bound to Wright— he afterwards took in Vokes into partnership— ~~was~~ now did this bond extend to Vokes— no the A was bound only to Wright and not to Wright and Vokes:

1 Will 536

The obligee of a bond may sue either heir or Exr of the obligor is dead— for both are answerable so far as assets extend—
3 Lev 189 1 Vern 239

If a man is bound to pay 2 sums of money at 2 several days — can you recover in an action of debt so fast as it falls due — you may upon point of principle the contract is good and the sum is certain — but the law is settled otherways —

Suppose a man should promise to pay 2 several sums as above can you bring an action of Assumpsit — yes — the reason is a man promises to pay an entire sum as 500 dolls at 2 different times — but if you promise to pay 20 dolls tomorrow and 20 dolls next day of the debt lies for this

Now hence if this distinction is forgotten authorities are contradictory

Co. Litt 292 (Henry 8th 2 ch. 3)

But suppose it is a bond conditioned to pay 20 dolls on the first day and 20 on the 2 day — now debt lies upon the first failure ~~if you~~ for the sum falls due immediately —

Suppose you had hired a farm for a thousand dolls upon a condition that if you did not pay at the end of the 1st year 100 dolls are forfeited and so of the second — now how can you

should down the bond – if he sued upon – the second suit must be sci. facias – upon the bond [first set forth] toties quoties as the bond is broken –

"A scire facias" is an action brought to show cause why another judgt should not be rendered

1 Will 80 – Bull ni 'pr 16

Upon bonds of indemnity when may you sue – when you are damnified you may sue – but, when are you damnified? If the bond has fallen due and the surety pays it then this lies – but will the bare liability justify this action to be brought –

This is questio vexata – one thing is clear that if the obligor had agreed to pay at such day then the surety would have an action for the damages – but can this action be brought for the whole debt – since the surety may be liable to pay the whole – but suppose he sues the bondsman and does not pay it to the creditor but keeps it – then the creditor may sue upon the bond and recover upon the bond and the bail to pay twice so that he bond twice or both –

If a man sue on upon most of of torts & mere

liability will support this action but the same hardship exists in this case—
E.g. the Shff may see the recovery before the Creditor sues him the Shff—
Where A becomes surety to A upon a debt due upon demand—the liability will not support this action for A knew that he was to be liable—and all the cases found in the books are of this kind—and hence arose the rule—
Then which is the greatest hardship—I think the bondsmen ought to suffer and if he has to pay it on a money tried—Indeb. Assumpsit lies—
But said that Indeb. Assumpsit does not lie to overturn a judgment—but this is fallacious—All the money cannot be holden justly then this action will lie—
Thus now the insurers recover and then the ship arrives and now this action lies—this does not impeach the judgt the money was ~~paid~~ got justly but cannot be held justly.
Well now in the case of the bondsmen he may bring ~~act~~ an audita querela & the Shff & the surety & Sureties have been divided—Judge Reeve thinks that mere liability will support

the action upon the bond -

Cook Plea 63 Salk 3 Bulst. Where two lost on the binding are Super this the subject - A may recover less than the damages upon a simple contract -

1 Ken. B.R. 22, 4 Burr. 2430

In an action upon the contract you must set forth the consideration but upon a bond this is not necessary for the sealing is sufficient consideration - But the you must make profert upon the bond - The law requires a profert on all bonds

1 Wils 182 Str. 1186

A bond may be lost yet you may bring an action upon it - yet you must state and prove that it was lost - it may be difficult to show it - 3 T.R. 151

Another rule -

Suppose a man sues upon a bond and state the condition - you may sue upon the penalty or upon the bond and set forth the condition but if you do the last you must set out a breach yet you cannot set not but one breach if there are a dozen breaches

this is ~~held~~ ~~at~~ a mere position ~~not~~ rule
why may this not be done — because this is
unnecessary ~~to the~~ yet tis not for the
Pltff may fail in proving one he is gone
In cost you may ~~see~~ aver a thousand
breaches if he or so many — now
there is no reason ist his distinction —
In later years this has been infringed
upon — ~~See~~ 2 Bevor 773 1 Thom 227
In the action of debt for rent of an estate
at will you must state the entry and
occupation for this is the ground of claim
but upon an estate for years you
need not aver entry and occupation —
for in this case as the ground of claim
is upon the lease & the privity which formerly
is founded upon entry and occupation.
It may be thought an impediment — this must
be set forth without variance —
i.e. Chitty 360 Henry H 119

Different Pleas –

"The General plea is nil debet under this you may give almost any thing as evidence or infamy release and in short ~~strange~~ ~~no~~ any thing which shows that nothing is due –

In suit upon a bond nil debet is not good plea for the bond is former fair evidence of something due and you can introduce no counter proof to vary them

<u>Cook Eliz 647</u>

An action is brought upon a bond without any condition upon the face of it – but the obligor says there was a parole agreement there cannot be shown – it introduces parol proof.

<u>Hob 248</u>

You may deliver a bond to A.S. as an escrow to deliver it upon some condition to somebody – yet you cannot deliver them to some other himself – the question this "then" is there – said you cant deliver a deed to be operable upon some future condition except the condition is to be performed before the estate can vest

Now I convey to John Stiles black acre but tell him that he shall not have that unless he conveys white acre to me – John says he will – but refuses and does not convey white to me – now I grant this with condition and the deed is taken only without that condition –

The two strongest cases are founded in Cro. Eliz. — Then if you deliver an obligation upon condition to be performed at the time n... in this case the condition must be performed before the deed can take effect but when the condition is something future then the deed cannot be ~~delivered~~ delivered as an escrow for the delivery is an absolute ~~escrow~~ deed not an escrow

Cro. Eliz. 835 5 Co. 20 Comyn 207

But if the agreement is reduced to writing this may be introduced to vary the ~~effect~~ bond — for this is not introducing parol proof —

Suppose a bond for 500 300£ was paid and then the parties made a writing that only 2 should be paid — this may be shown Cro. Eliz. 623 5 Co. 26 Lut. 65 1 Lev. 120

A set of cases grown up in modern times —

When a person has become a trustee to another man — a discharge from the ~~trustee~~ man himself and not trustee the court will take notice of it —

A assigns over a note and becomes a bankrupt — now this is not a forfeiture of the note — the bankrupt cannot sue this in his own name — nor can he sue in the trustees name — yet he may sue in the trustees name and if the Bankrupt pretends this then the trustee may reply that the bond was assigned over before bankruptcy — 1 H. Bl. 611 622

You may amend the bond and carry its legality 1 Wils 344

Non est factum

May you make this plea where a bond was executed by a feme covert or infant &c —

1 Yes may be made where the [illegible] bond given —

2 When the bond was made by fraud and not as he intended — [illegible]

3 When he did execute it without fraud and there has been some alteration or interlineation

These are matters of fact

First a bond may be void at law and yet you can not plead non est factum — as usury — illegal — infancy coverture — Stat of limitation —

1 Salk 675 5 Coke 119 Hardy 24

2 T 8 5 Co L 120 [illegible]

Nil debet can be plead on a bond for money

Solvit ad diem — the Stat has permitted this plea if the money is paid at the day —

Even when you must have this solemn a discharge on the obligation — if the bond is sealed the discharge must be sealed Stat of Anne —

Chittendens reports upon this subject

Whenever there is a condition in a deed you may introduce parol proof to prove the performance of the condition—

But as to bonds without condition, suppose he payed before the day or the day after next — and the payment was after the right proved— the Stat of Ann and other Stat allow you to prove payment after the day.

Bl. Ano. pri 174 & Stary 994
& Bevan 9 4 & 1 Wm Bl 111

How may you prove the payment—by witness—receipt—or by length of time (as 20 years) though the length of time has been sufficient to raise the presumption that it was paid. 16 years has been sufficient—

1 Wm 2 134 Com 149 1 Stary 502

What shall rebut it—It is said the endorsement may take it out—others deny it & I think it will if made with the consent of either of the obligees.

If the endorsement is made after the 20 years ~~[illegible]~~ does not rebut it—

& Strange 826 & Anthony 670

[illegible]

As to a [illegible] bond the money advanced [illegible] vide—

[illegible]
2 [illegible] 1197

Plea of Accord and Satisfaction

Upon the principle of Com. law this cannot be pleaded as this would introduce parol proof to vary written.

In this you must prove that he did agree to accept and that he did accept — there must be an actual acceptance — and this must be a bar

5 Co. 117 / Bac. 5 17. 2 3d

The thing offered must be of some value and of a pecuniary nature — thus a man said to another you may have my horse if I don't pay at such time there is no ~~agreement~~ consideration —

It must be money or money's worth or yielding benefit to pl[illegible] —

Suppose he beats him and then asks pardon now is this a good accord and satisfaction no — there is no consideration for this does not remunerate him who has been injured —

next plea is Foreign Attachment -

This is attaching the goods of the debtor in the hands of his creditor, he the debtor being out of the state - Now after the service of this writ on the garnishee the garnishee cannot pay the property in his hands over to his creditor - ——

In a bond to save harmless the deft must shew that he has saved him harmless or that the injury or damnification has arisen by his own fault - he must shew how he saved him harmless - 1 Stra. 681

Pleading in an action of rent - several defences -

1 If the Pltff did not own the land this is good defence in "nil habet tenementis".

3 Lev. Heath v. Henningham

2 If you deny the lease you must plead non demisit - but the' has been a demise and you have paid then you may plead nil debet

3 Nothing in arrear - Com. 588

4 Entry and eviction - there must be an eviction and entry both - Com. p. 24 … Hob. 326

5 Stat of limitations in simple contract

Whenever the plea of infancy is made if the minor ~~????~~ notes after he becomes of age he is liable
Cowp. 320 holding over is an
implied promise to pay the whole —

plea to actions on debts by judgment — you can never introduce proof ~~that~~ to overturn the point — but if you deny the judgt then plead nul tiel record — in which case you must show the record itself if in the same court or if in another court a certified copy —
1 Hob. 99

Any thing subsequent to judgt that discharges may be plead —

Action of debt upon bail bond — an action of debt lies upon this bail bond — and to this action you cannot prove the principal never was arrested for this is not ~~????~~ the point in dispute — It is not necessary the sheriff be an ancest
1 Term 2, 21. 27

You may traverse the inducement or not — (so said by elementary books)

on [illegible] — Fig. 110

Plea of Sett off this a nature of Stat not so at Com law — now you cannot never said set off any unliquidated or uncertain thing — and then if any thing remains then the Pltff recovers the remainder —

But in Chancery always allow sett off whether the Stat authorizes it or not —

But Equity will not always allow this then you must in Equity state that the Pltff was a bankrupt

Plea of Release. this operates so far as the terms of the release extends —

"A release of all demands" this discharges all debts which are due at the time and debts which are certain and payable at some future time as debitum in presenti to be paid in futuro —

This will not operate to discharge rent due at the end of the year — for there is no "demand" this may be growing and not grown —

5 Ml 578

A man who is bail — settles with the Pltff and has a release of all demands before judgment upon the Principal — not good plea — for this a contingency

5 C L 70

As to bonds joint and several —

A bond is joint when it is not mentioned other-wise — now when the bond is joint & several to come is a bond upon both — but when it is several a release to one does not ... release the other — 1 Strang 403. Lutw. 58 1 Show 8

1

As to the Evidence

The best evidence the nature of the case will admit of must as a general rule be admitted and no other. A man's confession is not so good as the subscribing witness — Lord Mansfield thinks it is going too far — for confession is the best of Evidence — 2 Strange ~~...~~ 833

But if the witness says he did not see him sign it then you may call in other persons to say that he did sign it — 2 Blackstone question the people of the town contradicted the evidence of the witnesses.